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OCTOBER TERM, 1975

No. 75-382

FEDERAL ENERGY ADMINISTRATION, ET AL.,
PETITIONERS

v.

ALGONQUIN SNG, INC., ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief for the Respondents

FRANCIS X. BELLOTTI,
Attorney General
of Massachusetts

S. STEPHEN ROSENFIELD,

THOMAS R. KILEY,
Assistant Attorneys General
State House,
Boston, Mass. 02133

HAROLD B. DONDIS,

WILLIAM F. GRIFFIN, JR.,

JOE H. HICKS,
RICH, MAY & BILODEAU
One State Street
Boston, Mass. 02109

JAMES S. HOSTETLER,
GADSBY & HANNAH
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

WILLIAM R. CONNOLE,
CONNOLE & O'CONNELL
One Farragut Square
Washington, D.C. 20006

BATEMAN & SLADE, INC., BOSTON, MASSACHUSETTS.

Table of Contents

Statement of the case 1

Summary of argument 9

Argument 12

I. Jurisdiction is not barred by the Anti-Injunction Act. 12

A. The Anti-Injunction Act applies only to taxes imposed under the Internal Revenue Codes of 1939 and 1954. 12

B. The Anti-Injunction Act is not a bar to a petition for review of regulations promulgated by the Federal Energy Administration. 13

C. The Anti-Injunction Act does not apply to license fees imposed by Executive action. 16

II. The President does not possess authority to impose import license fees under 19 U.S.C. 1862(b). 21

A. Introduction. 21

B. The authority delegated by Congress to the President under 19 U.S.C. 1862(b) is limited to imposition of direct import controls. 24

C. Authority to impose import license fees may not be implied without a clear statutory directive. 32

1. A delegation of the taxing power requires a clear statement from Congress. 33

2. The manifest intent of Congress under the trade acts has been to limit the delegation of the tariff power. 37

D. Section 1862(b) must be interpreted narrowly in order to avoid serious constitutional questions. 41

1. The statute should be construed to avoid an unconstitutional delegation of the tariff power. 42

2. The import license fee system would contravene the constitutional requirement that all import duties be uniform throughout the United States. 47

E. The legislative history demonstrates that Congress did not intend to delegate authority to impose a license fee system under § 1862(b). 49

1. The history of the tariff and trade expansion acts negates any claim of license fee power under § 1862(b). 51

2. The legislative history of § 1862(b) negates any implication of a license fee power under that section. 57

a. The Trade Agreements Extension Act of 1955. 58

b. The Trade Agreements Extension Act of 1958. 78

c. The Trade Expansion Act of 1962. 79

d. The Trade Act of 1970. 83

e. The Trade Act of 1974. 88

f. Congressional action since Proc. 4341. 93

Conclusion 97

Table of Authorities Cited

Cases

Alexander v. "Americans United" Inc., 416 U.S. 752 (1974) 20

Amoco Oil Corp., et al. v. Zarb, et al. (D.D.C., C.A. 75-1529) 7n

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 41

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 41, 91n

Bob Jones University v. Simon, 416 U.S. 725 (1974) 18n

Bowles v. Willingham, 321 U.S. 503 (1944) 16n

Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) 36

Burnet v. Guggenheim, 288 U.S. 280 (1933) 25

Cheatham v. United States, 92 U.S. 85 (1875) 19n

Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103 (1948) 23

Cleveland v. United States, 329 U.S. 14 (1946) 90

Coastal States Gas Corp., et al. v. Federal Energy Administration, et al. (S.D. Tex., C.A. 75-H-1668) 7n

Consumers Union of U.S. v. Kissinger, 506 F. 2d 136 (D.C. Cir. 1974), cert. denied, 421 U.S. 1004 (1975) 26

Consumers Union of U.S. v. Sawhill, 525 F. 2d 1068 (T.E. C.A. 1975) 31

Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851) 36

Crowell v. Benson, 285 U.S. 22 (1932) 41
Downes v. Bidwell, 182 U.S. 244 (1901) 47, 48
Federal Maritime Commission v. Seatrain Lines, 411 U.S. 726 (1973) 40, 41, 63n, 91
Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974) 15, 21, 35, 36, 42, 56
Girouard v. United States, 328 U.S. 61 (1946) 33, 34
Hampton & Co. v. United States, 276 U.S. 394 (1928) 42n
Helvering v. Hallock, 309 U.S. 106 (1940) 90
Kent v. Dulles, 357 U.S. 116 (1958) 43
Laing v. United States, _____ U.S. _____, 44 U.S.L.W. 4035 (1976) 20
License Tax Cases, 75 U.S. (5 Wall.) 462 (1866) 36
Lipke v. Lederer, 259 U.S. 557 (1922) 18n
McCray v. United States, 195 U.S. 27 (1904) 17, 18
M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 34n
National Biscuit Co. v. City of Philadelphia, 374 Pa. 604, 98 A. 2d 182 (1953) 36n
National Cable Television Assn. v. United States, 415 U.S. 336 (1974) 16, 18, 21, 34, 35, 36, 40 et seq.
Neirbo Co. v. Bethlehem Corp., 308 U.S. 165 (1939) 12
New England Power Co. v. Federal Power Commission, 467 F. 2d 425 (D.C. Cir. 1972), aff'd, 415 U.S. 345 (1974) 26n
New York v. Saper, 336 U.S. 328 (1949) 90

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 43
Pan American Standard Brands, Inc. v. United States, 177 F. Supp. 769 (Cust. Ct. 1959) 45n
Porter v. Dicken, 328 U.S. 252 (1946) 16n
Preiser v. Rodriguez, 411 U.S. 475 (1973) 15, 16
Regal Drug Corp. v. Wardell, 260 U.S. 386 (1922) 18n
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 50
Rice v. Sioux City Memorial Park Cemetary, Inc., 349 U.S. 70 (1955) 8
Sardino v. Federal Reserve Bank of N.Y., 361 F. 2d 106 (2d Cir. 1966), cert. denied, 385 U.S 898 (1966) 23
Saxbe v. Bustos, 419 U.S. 65 (1974) 91
Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 42n, 43, 44, 45n
Snyder v. Marks, 109 U.S. 189 (1883) 17, 19n
Star-Kist Foods, Inc. v. United States, 275 F. 2d 472 (C.C.P.A. 1959) 44, 45
Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941) 90
Train v. City of New York, 420 U.S. 35 (1975) 51n, 52n
United States v. Kahriger, 345 U.S. 22 (1953) 18n
United States v. Shreveport Grain & Elev. Co., 287 U.S. 77 (1932) 79
United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) 90
United States v. Yoshida International, 526 F. 2d 560 (C.C.P.A. 1975) 47n

Werner v. United States, 119 F. Supp. 894 (S.D. Cal. 1954), aff'd, 233 F. 2d 52 (9th Cir. 1956), cert. denied, 352 U.S. 842 (1956) 23
Wong Yang Sung v. McGrath, 339 U.S 33 (1950) 90
Zuber v. Allen, 396 U.S. 168 (1969) 65, 89

CONSTITUTIONAL PROVISIONS

United States Constitution, Article 1, § 8, cl. 1 28n, 34n, 47, 54

STATUTES

2 U.S.C
§ 61c-1 27n
§ 81b 27n
5 U.S.C
§ 5348 27n
§ 8714 27n
7 U.S.C.
§ 624 38n, 47n, 71
§ 903 27n
§ 1132 27n
§ 1301 27n
§ 1326 27n

10 U.S.C.
§ 2734 27n
§ 5767 27n
12 U.S.C
§ 1701s 27n
§ 1726 27n
15 U.S.C.
§§ 751 et seq. 15, 31
§ 753(g) 30n
§§ 701 et seq. 13
§ 766(i)(2)(A) 9, 13
§ 1987 27n
16 U.S.C 81m 27n
19 U.S.C.
§§ 160 et seq. 46n
§ 170a 27n
§ 1202 24n
§ 1303 46n
§ 1336 64n
§ 1338 64n
§ 1351 38n, 64n
§ 1351(a)(1) 27n
§ 1360(a) 27n
§§ 1363-1364 59n, 64n
§ 1528 18n
§ 1821 38n
§ 1841(a) 27n
§ 1844 27n
§ 1845 27n

§ 1845(a) 27n
§ 1861(a) 27n
§ 1862 43
§ 1862(a) 27
§ 1862(b) 2, 3, 4n, 6, 7, 9, 10 et seq.
§ 1862(c) 22, 43, 78
§ 1881 27n
§ 1882(a)(3) 27n
§ 1901 38n, 59n, 83n
§ 1902 59n
§ 1981 38n, 47n, 59n
§ 1981(b) 46n, 83n
§ 2132 39n
§§ 2251-2253 59n
§ 2253 38n
§ 2481(2) 27

26 U.S.C. 7421(a) 6, 9, 12, 16, 17, 19
28 U.S.C. 1331, 1340 6
29 U.S.C. 151 27n
31 U.S.C
§ 348 27n
§ 483a 34
33 U.S.C. 1251 et seq. 51n
42 U.S.C
§ 1983 16
§§ 4321 et seq. 6

45 U.S.C. 228f 27n
50 U.S.C
§ 98 64n, 65n
§§ 98 et seq. 65n, 73n
50 U.S.C. App.
§ 5 22n
§ 5(b) 47n
§ 1231 27n
P.L. 87-794, 76 Stat. 882, 899 59n
P.L. 93-618, Title II, § 201, 88 Stat. 2011-2018, 2072 59n
61 Stat. Parts 5 and 6 (1947), General Agreement on Treaties and Tariffs 28
Agricultural Adjustment Act of 1933 71
§ 22 38n, 47n, 66, 70n, 71
Antidumping Act, 19 U.S.C. 160 et seq. 46n
Anti-Injunction Act, 26 U.S.C. 7421(a) 6, 9, 12, 13, 15, 16, 17 et seq.
Economic Stabilization Act of 1970, P.L. 91-379 14n
§ 211(d)(1) 14n
§ 211(e)(1) 14n
§ 211(f) 14n
Economic Stabilization Act Amendments of 1971, P.L. 92-210 14
Emergency Petroleum Allocation Act of 1973, P.L. 93-159 14n, 15, 31
§ 4(g) 30n
Emergency Price Control Act of 1942, c. 56, 56 Stat. 23 16n

Energy Policy and Conservation Act of 1975, P.L. 94-163 — 8, 32, 95
§ 2 — 95
§ 13(e) — 95n
§§ 151 et seq. — 95
§ 159 — 95
§§ 201 et seq. — 95
§§ 201(b)-(e) — 95
§ 202(a) — 95n
§ 203(e) — 95n
§§ 251 et seq. — 95
§ 251(b) — 95
§ 401(a) — 95
§ 551 — 95
§ 552 — 95
Federal Energy Administration Act of 1974, 15 U.S.C. 751 et seq. — 9, 14, 15, 20
§ 5 — 13
§ 6 — 13n
§ 7 — 15
§ 7(i)(2)(A) — 13
§ 8(f) — 15
Federal Water Pollution Control Act Amendments of 1972, § 207 — 51n
Fordney-McCumber Act of 1922, c. 356, 42 Stat. 858 — 52
Independent Offices Appropriation Act of 1952 — 34, 35
National Environmental Policy Act, 42 U.S.C. 4321 et seq. — 6
National Industrial Recovery Act of 1933 — 43

Revenue Act of March 2, 1867, 14 Stat. 475, § 10 — 19
Sherman Act of 1890 — 52
Smoot-Hawley Tariff Act of 1930, c. 497, 46 Stat. 590 — 24n, 45n, 51, 52, 53, 54, 55
Tariff Act, 19 U.S.C 1303 — 46n
Tariff Act, 19 U.S.C. 1336 — 47n
Trade Act of 1970 — 83, 84, 87n
Trade Act of 1974, P.L. 93-618 — 3, 27n, 51n, 54, 88, 89, 90 et seq.
§ 122 — 39n
§ 201 — 39
§ 202(a) — 39
§ 203 — 38n
§ 203(a) — 39
§ 351 — 47n
Trade Agreements Act of 1934 — 51, 53, 54, 59
Trade Agreements Extension Act of 1937, c. 22, 50 Stat. 24 — 53n
Trade Agreements Extension Act of 1940, c. 96, 54 Stat. 107 — 53n
Trade Agreements Extension Act of 1943, c. 118, 57 Stat. 125 — 53n
Trade Agreements Extension Act of 1945, c. 269, 59 Stat. 410 — 53
Trade Agreements Extension Act of 1948, c. 678, 62 Stat. 1053 — 53n

Trade Agreements Extension Act of 1949, c. 585, 63 Stat. 698 53n
Trade Agreements Extension Act of 1951, c. 141, 65 Stat. 72 53n
Trade Agreements Extension Act of 1953, c. 348, 67 Stat. 472 53n
Trade Agreements Extension Act of 1954, c. 445, 68 Stat. 360 53n
Trade Agreements Extension Act of 1955, c. 169, 69 Stat. 162 46n, 50, 51, 54, 58, 73
Trade Agreements Extension Act of 1958, P.L. 85-686 51n, 54, 78
Trade Expansion Act of 1962, P.L. 87-794 45n, 51n, 54, 79, 83
§ 201 38n
§ 232(b) 2, 21
§ 257 38n
§ 351 38n
Trading with the Enemy Act, 50 U.S.C. App. 47n
§ 5 22n
§ 5(b) 47n

REGULATIONS

10 C.F.R.
§ 206.33(b) 19n
§ 213 2

Foreign Assets Control Regulations, 31 C.F.R. 500.1-500.808 22n
Transaction Control Regulations, 31 C.F.R. 505.10-505.60 22n
Cuban Import Regulations, 31 C.F.R. 515.101-515.801 22n
Internal Revenue Codes of 1939 and 1954 9, 12
Judicial Code of 1911, 36 Stat. 1087, 1162, c. 231, § 265 16n

CONGRESSIONAL MATERIALS

101 Congressional Record
1661-91 66n
1668 66n
1671 66n
1675 66n
1676 66n
1679 66n
1727-96 66n
1739-43 56n
1758 66n
1768 66n
1774 66n
1775 66n
1777-8 66n
1790 66n
1791-2 60n, 67
1792 66n

1794	66n
5292	59n
5296	70n, 72
5297	70
5298	60n, 63
5299	60n, 73
5302	73n
5311	67
5312	55n
5389	62
5391	62
5396-418	56n
5538	60n, 68
5540-62	56n
5565	75n
5572	68
5582	68
5584	68, 74
5587	64n
5588	72
5593	60n, 69
5922	75n
8159	76
8159 et seq.	59n, 75
8160	65n
8161	65n, 76n
8162	90n

104 Congressional Record	
10463-4	45n
10877	78
108 Congressional Record	
12057	45n
19867	46n
19875	80
22182	83
116 Congressional Record	
37848	57, 77, 85
41798 et seq.	87n
41807	28n, 88n
43645	87n
43646	87n
119 Congressional Record	
40533	89n
40575	92n
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Hearings and Informal Procedures on Amendments to Incorporate the Text of the Trade Act of 1970 before the Senate Committee on Finance, 91st Cong., 2d Sess. (1970)	88n
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Hearings on Trade Agreements Extension Act before the House Committee on Ways and Means, 84th Cong., 1st Sess. (1955)	60n

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Hearings on "Windfall" or Excess Profits Tax before the House Committee on Ways and Means, 93d Cong., 2d Sess. (1974) 93n, 96
H.R. 1 (1955) 58, 59, 66, 69
§ 6 58n
§ 7 58n
H.R. 11970 (1962) 79
H.R. 17550 (1970), Social Security Amendments 87n
H.R. 18970 (1970) 83
H.R. 10710 (1974), Trade Act 88
H.R. 14462 (1974) 92
H.R. 1767 (1975) 23n, 93
H.R. 11450 (1975) Energy Emergency Act 14n
H.R. Doc. No. 94-70, 94th Cong., 2d Sess. (1975) 23n
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H.R. Rep. No. 91-1435, 91st Cong., 2d Sess. (1970) 83n, 84n, 85, 86, 87
H.R. Rep. No. 93-571, 93d Cong., 1st Sess. (1973) 90, 92
H.R. Rep. No. 93-628, 93d Cong., 2d Sess. (1974) 31
H.R. Rep. No. 93-748, 1974 Cong. & Adm. News 14n, 15
H.R. Rep. No. 93-1028 (1974) 92, 93n
H.R. Rep. No. 94-1, 94th Cong., 1st Sess. (1975) 93, 94, 95
S. 2589 (1975), Energy Emergency Act 14n
S. Rep. No. 232, 84th Cong., 1st Sess. (1955) 56n, 59n, 60n, 61n, 70n

S. Rep. No. 91-1431, 91st Cong., 2d Sess. (1970) 28n, 87
S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) 46n, 88n, 89n
S. Rep. No. 94-11, 94th Cong., 1st Sess. (1975) 95
Conference Rep. No. 745, 84th Cong., 1st Sess. (1955) 64, 65, 75

PRESIDENTIAL PROCLAMATIONS

Proc. 3279, 24 Fed. Reg. 1781 2n, 13n, 48n, 78
Proc. 4210, 38 Fed. Reg. 9645 3, 13n, 41, 47, 55, 56, 58 et seq.
§ 2(a) 3
§§ 15(b)-(e) 48n
§ 16 23
Proc. 4341, 40 Fed. Reg. 4771 5, 6, 13n, 20n, 23n, 24, 31n et seq.
§ 12 23
Proc. 4355, 40 Fed. Reg. 10437 5n, 7n, 13n
Proc. 4370, 40 Fed. Reg. 19421 5n, 13n
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Proc. 4412, 41 Fed. Reg. 1037 8, 32, 96

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1975 State of the Union Message, Outline of Energy Questions and Answers 17

2A Sutherland, Statutory Construction (4th ed. 1973) 15, 50, 63n

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White House Fact Sheet 24n, 30

World Oil Developments and U.S. Oil Import Prices, A Report Prepared for the Committee on Finance by the U.S. Tariff Commission, 93d Cong., 1st Sess. (1973) 25n, 26n, 28n, 29, 36, 37, 49

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Brief for the Respondents

Statement of the Case

1. Petitioners seek reversal of a decision of the United States Court of Appeals for the District of Columbia Circuit which invalidated a program of license fees imposed on imported petroleum and petroleum products. Respondents[1]

[1] Respondents fall into two groups. One group is comprised of nine states and the Governors of eight of those nine states. This group of respondents filed civil action No. 75-1281 in district court and a petition for review of FEA regulations (No. 75-1206) in the court of appeals. The second group consists of ten utility companies and an individual who is a Massachusetts consumer and Congressman. This group filed civil action No. 75-1282 in the district court and petition for review No. 75-1202 in the court of appeals. The two groups are separately represented, but this brief is a joint submission prepared on behalf of all respondents.

commenced four separate suits challenging the two-tier license fee system, all of which are consolidated in the court of appeals. The challenged license fees are imposed by the oil import regulations of the Federal Energy Administration (FEA) (10 C.F. R. 213) under the asserted authority of Section 232(b) of the Trade Expansion Act of 1962, 19 U.S.C. 1862(b). That section authorizes the President to:

> take such action and for such time, as he deems necessary to adjust the imports of [an] article and its derivatives so that . . . imports [of such article] will not . . . threaten to impair the national security.

The court of appeals found that in this section "Congress only delegated authority to adjust imports to protect national security through direct mechanisms" (Pet. App. 27a). Since the license fee system sought to regulate imports indirectly, the court reasoned that it was beyond the scope of the authority delegated to the Executive under § 1862(b) and therefore invalid.

2. The program under which the oil import license fees are imposed originated with the establishment of the Mandatory Oil Import Program by President Eisenhower in 1959.[2] In its original form the program required each importer to secure a license to import crude oil, unfinished oil and finished products. The United States was divided into five geographical districts and quotas were imposed on imports into the several districts. The Secretary of the Interior was required to allocate these quotas among persons having either a history of imports or already existing refinery capacity. No license fees were imposed under that program. From March 10, 1959, to May 1, 1973, the quota system imposed by the Mandatory Oil

[2] Pres. Proc. 3279, 24 Fed. Reg. 1781.

Import Program, as subsequently amended, remained in force without interruption.

3. In 1973 the quota system was abandoned in favor of a license fee system. President Nixon issued Presidential Proclamation 4210[3] in April of that year. This Proclamation retained the licensing aspect of the program but conditioned issuance of licenses upon the payment of a fee. It established a gradually increasing schedule of fees which were to escalate by the end of 1975 to $0.21 per barrel for crude oil and $0.63 per barrel for most petroleum products.[4]

The initial impact of these "first-tier" fees was cushioned by a provision in the Proclamation reserving certain amounts of imports for distribution to the several districts which might be made without payment of fees. Proc. 4210, § 2(a). The oil import regulations promulgated pursuant to the Proclamation accordingly provided for the issuance of fee-free licenses based primarily on import or refinery histories. These fee-free licenses were to be gradually phased out over a seven-year period; by 1980 all importers would be required to pay the full license fee amount. Significantly, Proclamation 4210 abolished the existing tariff on petroleum products,[5] and replaced it with the fee systems.

4. On January 3, 1975, the Trade Act of 1974 (P.L. 93-618) became effective. It worked several changes in § 1862(b),

[3] 38 Fed. Reg. 9645.

[4] At the outset of this "first-tier" system, license fees were set at substantially lower levels. The per barrel fee for crude oil, for example, was set at $0.105 and for finished products and unfinished oils at $0.15.

[5] The court of appeals held that § 1862(b) does not authorize a President to suspend duly enacted tariffs, but stated that relief from President Nixon's action was inappropriate since President Ford ultimately reinstated the tariffs (Pet. App. 28a., n. 18).

one of which was to transfer the responsibility to conduct an appropriate investigation under that section to the Secretary of the Treasury. The following day Secretary Simon delegated his authority to Assistant Secretary David R. MacDonald, directed him to conduct such an investigation and informed him that it would be unnecessary to hold public hearings or otherwise afford interested parties an opportunity to be heard (A. 154).

Assistant Secretary MacDonald then conducted a ten-day investigation, in the course of which he solicited and received comments from a number of federal agencies.[6] On January 13, 1975, he submitted a report of his investigation to Secretary Simon (A. 134). That report concluded with a statement of MacDonald's understanding "that a Presidential Proclamation pursuant to Section 232 of the Trade Expansion Act of 1962 is being drafted by the Federal Energy Administration consistent with these recommendations" (A. 152, 153). Secretary Simon's report to the President was transmitted on the following day, and it too concluded with a statement to the effect that a Presidential Proclamation was already being prepared (A. 133).[7]

Secretary Simon found that the national security was threatened by the level of oil imports and recommended to

[6] Secretary of State Kissinger was apparently consulted on January 3, before Mr. MacDonald had been assigned the task of conducting a § 1862(b) investigation (A. 155). Deputy Under Secretary of Labor, Joel Segall, indicated that the Department of Labor could not provide the requested information within the time allotted (A. 168).

[7] Respondents have consistently argued that no true investigation was conducted pursuant to § 1862(b), citing the precipitous nature of the inquiry and arguing that the outcome of the inquiry was predetermined. The court of appeals found it unnecessary to reach the issue posed by this contention (Pet. App. 10a, n. 11, 28a).

the President that "appropriate action be taken to reduce imports" (A. 132).[8]

5. On January 23, 1975, President Ford issued Proclamation 4341 based on the investigation and recommendation of Secretary Simon. It dramatically increased the amount of fees imposed under the oil import program by increasing the existing first-tier fees to their maximum levels, and by imposing a "second tier" of supplemental fees on all imported oil. The supplemental fees were originally to be phased in during February, March and April of 1975. The second-tier fees would have amounted to one dollar per barrel for oil entering the United States on or after February 1, 1975, and would have risen in one dollar monthly increments to a permanent level of three dollars per barrel for oil entering on or after April 1, 1975.[9] In addition, President Ford reinstated the tariffs which his predecessor had eliminated.

The fees contemplated by Proclamation 4341 were massive. The White House itself estimated that the second-tier fees alone would generate monthly revenues of $400 million, or $4.8 billion annually (A. 269).

[8] The court of appeals did not treat respondents' argument that the Secretary's statement was not a recommendation within the meaning of the statute (Pet. App. 28a).

[9] Proclamation 4341 authorized the Administrator of the FEA to reduce fees on unfinished oil products to zero in February, $0.60 per barrel in March and $1.20 per barrel in April. On January 31, 1975, the Administrator took action to reduce fees to those levels. 40 Fed. Reg. 4771.

Subsequent Presidential action resulted in the deferral of increases in the supplemental fee schedules. In spite of the claimed emergency nature of the original action which obviated public hearing, the two-dollar fee was not made effective until June 1, 1975, and the three-dollar fee was never imposed. *See* Exec. Proc. 4355, 40 Fed. Reg. 10437, A. 121-124; Exec. Proc. 4370, 40 Fed. Reg. 19421, A. 125-126; Exec. Proc. 4377, 40 Fed. Reg. 23429, A. 127-130.

6. Within four days of the issuance of Proclamation 4341, respondents brought actions in the United States District Court for the District of Columbia seeking declaratory and injunctive relief against the petitioners. Respondents contended that the imposition of license fees pursuant to § 1862(b) exceeded the delegation of authority contained in that section and that the fees were invalidly adopted without compliance with procedural safeguards imposed by § 1862(b) and the National Environmental Policy Act, 42 U.S.C. 4321 *et seq*.

In denying preliminary relief to the respondents and adopting findings in respect thereto as a final judgment,[10] the court found that although the respondents were irreparably injured by the license fee program, they had made no showing of a likelihood of success on the merits. The court held that the license fee program was one of a number of possible actions covered in the non-defined phrase "to adjust imports" (Pet. App. 42a). The court rejected the argument that the license fees are "taxes" and accordingly held that the action was not barred by the Anti-Injunction Act, 26 U.S.C. 7421(a), and that jurisdiction was properly predicated on 28 U.S.C. 1331 and 1340 (Pet. App. 42a). Finally, the district court found that the procedural prerequisites to a valid exercise of the power conferred by § 1862(b) had been satisfied (Pet. App. 47a). Respondents appealed this final decision to the United States Court of Appeals for the District of Columbia Circuit.

7. Respondents' appeals were formally consolidated in the court of appeals with their petition for review of the FEA's

[10] The respondents' requests for preliminary injunctive relief were denied on February 21, 1975. On March 7, 1975, the respondents filed a motion to consolidate the hearing on the merits with the hearing on the preliminary injunction. That motion was allowed on March 11, 1975, at which time the court adopted its earlier Findings of Fact and Conclusions of Law as a final judgment (A. 3, 4).

implementing regulations.[11] The court of appeals reversed the judgment of the district court, remanded the case to the district court, and set aside the FEA's regulations. The decision of that court is fully reproduced in the Petition for a Writ of Certiorari (Pet App. 1a-38a). The court did not reach the procedural arguments raised by the respondents. Instead, it based its decision on the nature of the power delegated to the Executive in § 1862(b). The court found that § 1862(b) authorized only the imposition of direct mechanisms to adjust imports (Pet. App. 42a), and that indirect pricing mechanisms were not among the regulatory measures the President could adopt.

8. Subsequent to its decision on the merits, the court of appeals stayed the issuance of its mandate to permit the filing of a petition for a writ of certiorari (A. 400). The respondents opposed the stay and repeatedly sought a modification of the order in order to preserve their claim to monies paid to the Administrator for license fees (A. 7-9, 12-14). Although the court denied the relief sought by the respondents, it did so on the representation of petitioners that the rights of all parties would be protected during the pendency of these proceedings.[12]

[11] The per curiam order consolidating the cases was entered on April 18, 1975. At that time the increase in supplemental fees to two and three dollars had been deferred pursuant to Proc. 4355 (40 Fed. Reg. 10437) and respondents' request for advancement of hearing was denied without prejudice (A. 6). The two-dollar supplemental fee took effect on June 1, 1975, and on June 6 respondents' subsequent motion for advancement was allowed (A. 7).

[12] Payments of license fees were deferred and preliminary injunctions requiring the defendants to deposit the fees collected were entered in two cases brought as a result of this litigation. *See* Notice of Further Deferral of Supplemental Fee Payments Originally Due August 31, 1975, at A. 380; *Amoco Oil Corp., et al.* v. *Zarb, et al.* (D.D.C., C.A. 75-1529); *Coastal States Gas Corp., et al.* v. *Federal Energy Administration, et al.* (S.D. Tex., C.A. 75-H-1668). In those cases preliminary injunctions were issued requiring petitioners to deposit license fees collected in a special interest-bearing Treasury account so that the fees will ultimately be available for refund.

9. Petitioners sought review by writ of certiorari, claiming that the decision of the court of appeals "impairs the President's capacity to take effective action . . . to extricate this country from its increasingly dangerous dependence on foreign petroleum" (Pet. App. 12). Respondents opposed issuance of a writ of certiorari, arguing, *inter alia*, that the announced intentions of the Executive to abandon the supplemental fee program rendered this case "episodic" within the meaning of *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). On January 3, 1976, the eventuality envisioned by respondents' Brief in Opposition came to pass. On that day, President Ford issued Proclamation 4412 (41 Fed. Reg. 1037), which amended the license fee program in light of the provisions of the Energy Policy and Conservation Act of 1975, P.L. 94-163. It eliminated the supplemental fee system upon a declaration that the purpose of the system would be served by the new statute; American dependence on foreign oil would be decreased by the provisions of the new Act.[13]

This Court granted certiorari on November 3, 1975.

[13] The issuance of Proclamation 4412 and attendant changes in the oil import program do not moot this case. The first-tier fees were left intact by that Proclamation. Those fees were challenged by the utility companies in the district court (A. 62-63, 69-70) and by both groups of respondents in their petitions for review (A. 348-349, 352-353). Respondents also claim a direct interest in the monies already collected and held in the special Treasury account.

While the action of the President does not render this case moot, respondents do suggest that the special reasons for granting certiorari no longer exist and that the writ should be dismissed as improvidently granted.

Summary of Argument

The President's imposition of license fees on imported oil was beyond the scope of authority delegated to him by 19 U.S.C. 1862(b). Well-established principles of statutory construction, legislative history, and the dire implications of the broad and unprecedented powers asserted by the President all establish that § 1862(b) authorizes adjustment of imports through use of direct mechanisms such as quotas, but not through indirect mechanisms such as license fees.

I.

The Anti-Injunction Act, 26 U.S.C. 7421(a), does not apply to this case. Respondents agree with the Solicitor General's conclusion that, in precluding suits brought "for the purpose of restraining the assessment or collection of any tax," Congress directed § 7421(a) exclusively at taxes imposed under the Internal Revenue Codes of 1939 and 1954. The Act is therefore inapplicable to a challenge arising under 19 U.S.C. 1862(b), which is part of the trade laws rather than the Internal Revenue Code. Respondents further argue, on a narrower ground, that the Anti-Injunction Act does not apply to the two cases that originated as petitions for review of FEA regulations. The specific statutory review provision in the Federal Energy Administration Act, 15 U.S.C. 766(i)(2)(A), contains a grant of jurisdiction that insulates the petition from dismissal under the Anti-Injunction Act. Finally, respondents argue that the Anti-Injunction Act does not apply to license fees imposed by Executive action. These fees, by the Presi-

dent's own designation, purport to be non-tax mechanisms, and this Court has consistently read § 7421(a) to permit suits to enjoin monetary exactions other than taxes.

II.

A. Turning to the substance of the appeal, respondents first describe the limitless nature of the authority claimed by the President under § 1862(b). Analyzing the statutory phrase "adjust the imports" under which the President has acted, respondents show that its scope logically includes only direct methods of adjustment such as quotas. Reference to other parts of Title 19 of the United States Code as well as other federal statutes indicates that the phrase denotes a direct and certain method for controlling imports. Indirect measures such as license fees have a speculative impact on imports and are therefore inconsistent with a sensible reading of § 1862(b).

Respondents next apply fundamental principles of statutory construction in support of their argument. First, delegations of the taxing power are disfavored without a clear and explicit statement from Congress. Because § 1862(b) nowhere mentions or implies the power to tax, the "clear statement" principle is fatal to petitioners' claim. This conclusion is buttressed by the fact that Congress, in passing and continually amending the Trade Acts, has made plain its intent to limit the extent of tariff power delegated to the President. Since the President's license fees were projected to collect more money in one year than all tariff provisions in Title 19 combined, these fees constitute a circumvention of the tightly limited tariff provisions and are inconsistent with Congressional intent. Respondents submit, as a final principle, that § 1862(b) must be interpreted narrowly to exclude license fee authorization in order to avoid serious constitutional questions. Under the boundless

reading offered by petitioners it could be argued, for example, that § 1862(b) represents an unconstitutionally broad delegation of legislative power.

B. The final sections of respondents' brief present the full framework of legislative history underlying the original enactment of § 1862(b) as well as subsequently proposed amendments. The consistent theme in this history is that Congress intended to give the President only the power to impose direct restrictions upon imports. Viewed in this context the isolated legislative statements cited by petitioners shrink to minor importance. In light of the long term philosophical tug of war between the Free Trade advocates and Protectionists in Congress, it is unrealistic to assume that Congress would knowingly enact or even consider including authority to impose fees or duties in § 1862(b) without fierce debate. Moreover, a review of the Committee Reports and the Floor Debates on the original version of § 1862(b) in 1955 reveals that Congress had in mind only direct measures such as quotas or voluntary import restraints as the means to adjust imports.

The subsequent rejection in 1962 of an amendment that would have added to § 1862(b) a power to impose duties further weakens petitioners' argument. Finally, when the Congress in 1970 once again considered amending § 1862(b), the Committee Reports and Floor Debates reiterate that adjustment of imports by quota, not duties, was contemplated in 1955. This history compels a conclusion that the imposition of the massive license fees by the President is beyond the scope of § 1862(b).

Argument

I.

Jurisdiction Is Not Barred By The Anti-Injunction Act.

A. *The Anti-Injunction Act Applies Only To Taxes Imposed Under The Internal Revenue Codes Of 1939 And 1954.*

In its order granting the petition for a writ of certiorari in this case, the Court directed the parties "to brief and argue the applicability of the Anti-Injunction Act, 26 U.S.C. § 7421(a)" (A. 402). The petitioners did not raise this issue before the court of appeals nor in their petition for certiorari. In their brief on the merits, petitioners have conceded that these actions are not barred by the Anti-Injunction Act. The basis for their concession is the conclusion that § 7421(a) is applicable only with respect to taxes imposed under the Internal Revenue Codes of 1939 and 1954, and is therefore inapplicable to 19 U.S.C. 1862(b) (Pet. Br. 21).

The respondents agree that the Anti-Injunction Act is not a bar to the present actions. As one ground for this conclusion, respondents adopt petitioners' argument that the Act is limited to taxes imposed under the 1939 and 1954 Internal Revenue Codes. Respondents further brief this issue because the Act is jurisdictional in nature, and it is axiomatic that the parties to an action may not by agreement confer jurisdiction on a federal court. *Neirbo Co.* v. *Bethlehem Corp.*, 308 U.S. 165 (1939). Moreover, this Court has narrower, alternative grounds on which it may base a decision that § 7421(a) is inapplicable.

B. *The Anti-Injunction Act Is Not A Bar To A Petition For Review Of Regulations Promulgated By The Federal Energy Administration.*

In their treatment of the Anti-Injunction Act, the petitioners assert that it applies equally to suits brought in the district court to enjoin the collection of a tax and to actions brought in the court of appeals to set aside administrative regulations (Pet. Br. 19). Respondents disagree. The Act does not apply to a petition for review of FEA regulations.

The petition filed in the court of appeals sought review of regulations issued by the FEA pursuant to authority conferred by Executive Order[14] and by § 5 of the Federal Energy Administration Act of 1974, 15 U.S.C. 761 *et seq.* (hereafter FEAA). Jurisdiction for such judicial review is expressly conferred by § 7(i)(2)(A) of the FEAA, 15 U.S.C. 766(i)(2)(A), which provides:

> Judicial review of administrative rulemaking of general and national applicability done under this chapter . . . may be obtained only by filing a petition for review in the United States Court of Appeals for the District of Columbia within thirty days from the date of promulgation of any such rule, regulation or order. . . .

To construe the Anti-Injunction Act in such a manner as to bar the maintenance of these petitions would be to place a

[14] The Federal program for the regulation of oil imports was created in 1959 as a licensing and allocation program by Proc. 3279 (Mar. 10, 1959, 24 Fed. Reg. 1781). The current program for the regulation of oil imports remains essentially a licensing program governed by Proc. 3279, as amended. Proc. 3279 committed to the Secretary of the Interior rulemaking authority for the establishment and administration of the program. These functions of the Secretary of the Interior were transferred in 1974 to the FEA by § 6 of the FEAA.

Procs. 4210 and 4341 alone created inchoate fees. Only the regulations of the Secretary of the Interior and the FEA brought the system into operation by providing a mechanism of collection and the exact terms of the fee itself. The FEA was also given broad authority to vary the fee from time to time. Proc. 4341, A. 113; Proc. 4355, A. 122; Proc. 4370, A. 126; Proc. 4377, A. 128.

restriction upon judicial review wholly inconsistent with the language of the Act and its legislative history, both of which indicate that Congress intended to subject all actions of the Administrator to review.[15]

The manifest purpose of the FEAA was to reorganize and consolidate certain energy related functions of the federal government in a single new agency. When it enacted the FEAA, Congress had before it the entire range of pre-existing energy related agencies and the statutes creating those agencies.[16] It could have adopted as a model for judicial review the provisions of any one of those statutes. The selection of the liberal provisions for review embodied in the FEAA is significant in light of the more stringent provisions considered and rejected prior to enactment.

The review provisions of the Senate version of the bill (S. 2776) were modeled on those of the Economic Stabilization Act Amendments of 1971.[17] The Ninety-Third Congress had

[15] *See* H.R. Rep. No. 93-748 at 1974 U.S. Cong. & Adm. News 2939. *See also* Minority Views of Hon. John E. Moss and Hon. Bella S. Abzug, *id.* at 2968.

[16] *E.g.*, the Economic Stabilization Act of 1970 (P.L. 91-379) as amended by the Economic Stabilization Act Amendments of 1971 (P.L. 92-210); the Emergency Petroleum Allocation Act of 1973 (P.L. 93-159); and the Energy Emergency Act of 1975 (H.R. 11450, S. 2589).

[17] Under the Economic Stabilization Act, as amended, a United States District Court or the Temporary Emergency Court of Appeals may enjoin the application of a particular regulation or order to a person who is a party to litigation before it. Section 211(e)(1). However, no regulation of any agency exercising authority under that Act may be set aside unless a final judgment has been issued as to the legality of the regulation. Section 211(d)(1). Furthermore, Subsection 211(f) of the Economic Stabilization Act, as amended, provides for an automatic stay of mandate from any final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of that Act or any regulation or order issued thereunder.

used those provisions as a model earlier in the session when enacting the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* When it enacted the FEAA, however, Congress expressly rejected the provisions of the Senate bill and opted instead for the House version. See H.R. Rep. No. 93-748 at 1974 U.S. Cong. & Adm. News 2939. The law as enacted does not contain the specific limitations on review which characterized earlier energy legislation. Furthermore, § 8(f) of the FEAA states that in the event of any inconsistency between the judicial review procedures otherwise applicable to functions transferred from other agencies to the FEA, and the liberal procedures in § 7, the provisions in § 7 shall govern.

In short, the jurisdictional grant in the FEAA insulates the petitions for review from an attack based on the Anti-Injunction Act. The FEAA and the Anti-Injunction Act must be read *in pari materia*:

> Where one statute deals with the subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail. . . . In the language of a court: "It is the general rule that where the general statute standing alone would include the same matter as a special act, and thus conflict with it, the special act will be considered as an exception to the general statute. . . . Where the special statute is later it will be regarded as an exception to or qualification of the prior general one. . . ." 2A Sutherland, *Statutory Construction* 315 (4th ed. 1973).

This principle of interpretation was recently applied by this Court in *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973). Despite the "literal applicability" of the general language of

the Civil Rights Act of 1871, 42 U.S.C. 1983, to complaints of unconstitutional disciplinary action in state prisons, the Court found that "Congress ha[d] passed a habeas corpus statute (28 U.S.C. § 2254), which required prior exhaustion of state remedies." Here, as in *Preiser*, "[i]t would wholly frustrate explicit congressional intent" to allow the earlier and more general statute to override the explicit provisions of the later and more specific statute.[18]

The Anti-Injunction Act was not held to bar jurisdiction over petitions to set aside license fees imposed by the Federal Communications Commission and the Federal Power Commission considered by this Court last term. *National Cable Television Assn.* v. *United States*, 415 U.S. 336 (1974); *Federal Power Commission* v. *New England Power Co.*, 415 U.S. 345 (1974). In those cases, as here, jurisdiction was based upon express statutory provisions for judicial review of agency rulemaking.

C. *The Anti-Injunction Act Does Not Apply To License Fees Imposed By Executive Action.*

Section 7421(a) prohibits suits to restrain the collection or assessment of a "tax." It reads, in pertinent part:

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

[18] In analogous cases, this Court has held that the specific provisions of the wartime Emergency Price Control Act of 1942 (56 Stat. 23, c. 56), granting authority for injunctive relief in the federal courts, constituted an exception to the general provision of the Judicial Code (§ 265 of the Judicial Code of 1911, 36 Stat. 1087, 1162, c. 231) forbidding federal courts from enjoining state proceedings. *Bowles* v. *Willingham*, 321 U.S. 503, 510 (1944); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946).

Respondents contend that there is a distinction between a license fee imposed by Executive action and a tax; § 7421(a) applies only to exactions of the latter category. Both the courts and the President have recognized that there is a difference between the two, and this Court need only maintain the already articulated distinctions in order to determine that the Anti-Injunction Act is inapplicable.

The Outline of Energy Questions and Answers which accompanied the President's 1975 State of the Union Message explicitly distinguished the oil import license fees from a tax and from a tariff.

> Q. What are the differences between a tax, a fee and a tariff?
>
> A. All three are charges which can be used to produce revenues and all three have the effect of reducing demand. The differences lie in the source of authority to levy the charge. A tax must be levied by Congress for the purpose of raising domestic revenue. A tariff is a charge against imports and must also be authorized by Congress. A fee is also levied on imported material but may be set for non-revenue purposes and need not be legislated.

This Court has indicated that a tax is "that which is in a condition to be collected as a tax and is claimed by the proper official to be a tax." *Snyder* v. *Marks*, 109 U.S. 189 (1883). It has declined to second-guess Congress on its use of the term in characterizing a monetary exaction. *McCray* v.

United States, 195 U.S. 27 (1904).[19] In the case at bar the President is the official who determined that license fees were to be imposed on imported oil. His characterization of the mechanism as a "non-tax" is controlling for purposes of the Anti-Injunction Act.

Like the President, this Court has also recently distinguished fees from taxes. In the *National Cable Television Assn.* case, *supra*, Justice Douglas wrote:

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. 415 U.S. at 340.

[19] For a brief period during the 1920's, the Judiciary did attempt to distinguish between measures which were truly taxes and those that were penalties. *Lipke* v. *Lederer*, 259 U.S. 557 (1922); *Regal Drug Corp.* v. *Wardell*, 260 U.S. 386 (1922). These cases represent a short-lived anomaly. *Bob Jones University* v. *Simon*, 416 U.S. 725, 741 (1974). Traditionally, the Court has refused to go behind what is formally a revenue measure to determine whether it is in fact a tax and has accepted the Congressional designation as controlling.

See, generally, Bernard Schwartz, *A Commentary on the Constitution of the United States*, Part I, p. 59, commenting on *United States* v. *Kahriger*, 345 U.S. 22 (1953). That the Congressional designation of a measure as a tax distinguishes it from other mechanisms is underscored by the provisions of 19 U.S.C. 1528, which reads:

> No tax or other charge imposed by or pursuant to any law of the United States shall be construed to be a customs duty for the purpose of any statute relating to the customs revenue, unless the law imposing such tax or charge designates it as a customs duty . . . imposed under the customs laws.

In order to determine that the Anti-Injunction Act is not a bar to these actions this Court need only maintain the distinctions already articulated by the President and the courts. The respondents did not seek to enjoin the assessment or collection of a tax by Internal Revenue officers deposited in the general funds of the Treasury. On the contrary, suit was brought to enjoin the collection of a license fee imposed by executive fiat, collected by the FEA and held in a separate suspense account. The license fees were not designated a tax by the Congress or the President and are not collected in the manner of a tax.[20] Clearly, the provisions of § 7421(a) do not deprive the federal courts of jurisdiction to hear suits to enjoin such license fees.

Neither the history nor the manifest purpose of the Anti-Injunction Act suggests that it is applicable to non-tax mechanisms. The statute originated over a century ago in Section 10 of the Revenue Act of March 2, 1867, 14 Stat. 475. It has consistently been read in a fashion permitting suits to enjoin monetary exactions other than taxes. The purpose of the act is to protect the efficient operation of tax collection against pre-enforcement judicial interference. In the words of Justice Blackmun:

> It was enacted to prevent in the federal system the type of injunctive suits that had plagued tax collections by the States. The Court has recognized the congressional concern underlying the statute, namely, that if courts were to exercise injunctive power with respect to the collection of taxes, the Government's very existence could be threat-

[20] To the extent that the Anti-Injunction Act embodies the purpose that disputed tax matters be presented for administrative remedies without interference with the collection process (*see Snyder* v. *Marks*, 109 U.S. 189 (1883); *Cheatham* v. *United States*, 92 U.S. 85 (1875)) it is useful to note the total lack of administrative machinery available to those challenging oil import license fees. The Board of Oil Import Appeals has no jurisdiction over an appeal based upon the invalidity of the license fee system. 10 C.F.R. 206.33(b).

ened. *Laing* v. *United States*, _____ U.S. _____, 44 U.S.L.W. 4035, 4045 (1976) (dissenting opinion).

The purpose of the act would not be served by extending it to encompass what the President himself labeled as "non-revenue raising"[11] license fees imposed for non-revenue raising purposes. If the Anti-Injunction Act were applied to monetary exactions created by the President, the actions of the Executive branch would gain immunity from review in instances where it had exceeded its authority under statutes which were regulatory in nature and made no mention of a taxing power.

Ordinarily, a two-step analysis is used in determining the applicability of the Anti-Injunction Act. The court asks first when the statute applies and, second, when it is applicable, under what circumstances an exception is permitted. *See Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 767 (1974). In this case it is unnecessary to consider whether or not an exception is in order because, on the first issue, the statute does not apply. The act bars actions to enjoin or restrain the collection or assessment of a "tax" but is inapplicable to petitions for review filed pursuant to the FEAA and to suits challenging license fees. Consequently, it is appropriate for this Court to proceed to the merits of the appeal.

[11] In ordering the imposition of license fees, the President purported to take an action designed to protect the national security rather than raise revenue. Presidential Proclamation 4341 read in part:

> WHEREAS, I judge it necessary and consistent with the national security to further discourage importation into the United States of petroleum, petroleum products, and related products, in such quantities or under such circumstances as to threaten to impair the national security; to create conditions favorable to domestic crude oil production needed for projected national security requirements; and to increase the capacity of domestic refineries and petro-chemical plants to meet such requirements; and to encourage the development of other sources of energy.

II.

THE PRESIDENT DOES NOT POSSESS AUTHORITY TO IMPOSE IMPORT LICENSE FEES UNDER 19 U.S.C. 1862(b).

A. *Introduction.*

Section 232(b) of the Trade Expansion Act of 1962, 19 U.S.C. 1862(b), directs the President, if he determines after due investigation that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security,

> . . . [to] take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security.

The court of appeals construed this statutory language as delegating to the President the limited power *directly* to adjust imports by the imposition of quotas or other quantitative limitations, rather than the expansive power to take any action which might *indirectly* adjust the level of imports, such as the imposition of tariffs, license fees or other monetary sanctions. In so holding the court of appeals focused upon (a) the Congressional tradition of narrowly and carefully circumscribing delegations of the taxing power, (b) the legislative history of the trade agreements acts, and (c) the principles of public policy and constitutional law embodied in the *National Cable Television* and *New England Power Co.* decisions[12] (Pet. App. 12a).

[12] *National Cable Television Assn.* v. *United States*, 415 U.S. 336 (1974); *Federal Power Commission* v. *New England Power Co.*, 415 U.S. 345 (1974).

In contrast, the petitioners seek to derive from § 1862(b) expansive and unprecedented executive powers over domestic and foreign commerce. The President's power under § 1862(b), they assert,

> is subject to only one limitation. The President must deem the action to be necessary to accomplish the prescribed objective. . . . The statute does not otherwise limit in any way the nature of the action that the President may take. (Pet. Br. 26.)

Such an expansive interpretation envisions § 1862(b) as a virtually complete abdication of the commerce and tariff powers by the Congress, quite properly characterized by the court of appeals as an "anomalous delegation of almost unbridled discretion and authority in the tariff area" and "a massive assertion of executive authority in an area . . . thoroughly occupied by Congress" (Pet. App. 14a). This characterization is not an exaggeration, as illustrated by the following implications of the powers claimed by the President:

1. The President's asserted power to adjust imports extends, by reason of the broad definition of "national security" contained in § 1862(c), over almost every article of commerce.[23]

[23] The court of appeals stated that "the number of articles potentially covered under the umbrella of 'national security' is great" (Pet. App. 14a). The Trading with the Enemy Act, 50 U.S.C. App. 5, which likewise gives licensing powers to the President over articles of foreign commerce, has been interpreted to cover a vast array of articles. *See generally*, Foreign Assets Control Regulations (31 C.F.R. 500.1-500.808); Transaction Control Regulations (31 C.F.R. 505.10-505.60); and the Cuban Import Regulations (31 C.F.R. 515.101-515.801).

2. The President's asserted power under § 1862(b) includes the power to impose tariffs unlimited in amount — a claim of unbridled discretion without precedent in U.S. tariff legislation — as well as the power to abolish tariffs completely. *See* Proc. 4210, § 16; Proc. 4341, § 12.

3. The President's asserted power would be essentially unreviewable by the judiciary since it involves a national security determination. *Cf. Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948). *See also, Sardino* v. *Federal Reserve Bank of N.Y.*, 361 F. 2d 106 (2d Cir. 1966), *cert. denied*, 385 U.S. 898 (1966); *Werner* v. *United States*, 119 F. Supp. 894 (S.D. Cal. 1954), *aff'd*, 233 F. 2d 52 (9th Cir. 1956), *cert. denied*, 352 U.S. 842 (1956).[24]

When Congress authorized the President to adjust imports, it did not intend to confer the unlimited, unprecedented and unreviewable executive powers claimed by the petitioners in this case.

[24] Also, the President's asserted exercise of these broad nonreviewable powers may not be rescinded by Congress — as recent experience indicates — except by overriding a Presidential veto by two-thirds vote of both Houses of Congress. In February, 1975, Congress passed a bill (H.R. 1767) which would have imposed a 90-day moratorium on the imposition of the supplemental fees imposed by Proc. 4341. This bill was vetoed by the President. H.R. Doc. No. 94-70, 94th Cong., 2d Sess. (1975).

B. *The Authority Delegated By Congress To The President Under 19 U.S.C. 1862(b) Is Limited To Imposition Of Direct Import Controls.*

President Ford, relying on the generality of the language of § 1862(b), has asserted power to levy import license fees calculated to have a major impact on the domestic economy (A. 239 *et seq.*). The revenues predicted to be derived by the supplemental oil import license fee system amount to $4.8 billion per year. The staggering amount of this levy is underscored by the fact that the total revenues from all tariffs imposed by authority of Congress during fiscal 1974 were $4.3 billion.[15] The President asserts the right, therefore, with a stroke of a pen to more than double the levies on imports by imposing fees on one article of commerce. Moreover, the fees authorized by Proc. 4341 would be at least 16 to 18 times greater than the highest tariff imposed on oil in the nation's history.[16]

Literally read, the broad language of § 1862(b) (to "take such action . . . as he deems necessary") could be construed to vest in the President the power: (a) to employ indirect methods of import control such as subsidies to domestic producers, users, importers or exporters; (b) to impose, modify or repeal internal tax measures affecting participants in the oil industry, such as excises, depletion allowances, tax credits, or other

[15] White House Fact Sheet, A. 249. U.S. Customs Service, Activity Report Fiscal Year 1974. The U.S. Customs Service confirms, as total revenues raised by tariffs, the amounts of $4,267,764,678 for 1974, $4,093,494,555 for 1973, and $4,197,347,810 for 1972.

[16] The highest rate of duty imposed on oil under the Tariff Act of 1930 is approximately $.20/bbl ($.005/gal.). 19 U.S.C. 1202; Tariff Schedules of the U.S., Sched. 4, Pt. 10, Item 475.05 *et al.* The combined first- and second-tier fees imposed by Proc. 4341 for finished petroleum products amount to $3.63/bbl; for crude oil such fees amount to $3.21/bbl.

incentives or disincentives; (c) to modify U.S. flag shipping requirements; (d) to impose foreign exchange controls; (e) to establish strategic petroleum reserves; or (f) to compel increases in domestic oil production, procurement or usage standards.[17] The statute could also be literally read to authorize the President unilaterally to impose energy conservation measures such as closing of filling stations, shops and public buildings. He could reduce speed limits, ration heating oil, decree year-round daylight saving time, impose excise taxes on large automobiles, impose windfall profits taxes and regulate oil and natural gas prices. All these measures would indirectly affect petroleum import levels.[18]

While the extreme generality of § 1862(b) makes such extravagant interpretations possible, the question remains whether it is appropriate for this Court to so construe the section. In the words of Mr. Justice Cardozo, the question is "which choice is it the more likely that Congress would have made?" *Burnet* v. *Guggenheim*, 288 U.S. 280, 285 (1933).

The decision of the court of appeals held that § 1862(b) limited the President to the imposition of "direct" import controls such as quotas, in contrast to "indirect" import controls such as tariffs or license fees. Only this limited interpretation is consonant with the language and intent of the Congress in enacting § 1862(b).

[17] *See* World Oil Developments and U.S. Oil Import Policies, A Report Prepared For The Committee On Finance by the U.S. Tariff Commission, 93d Cong., 1st Sess. 111-112 (1973) (hereinafter the Tariff Commission Report).

[18] All of the foregoing measures were adopted in either Europe, Japan or the United States in response to the 1973 "energy crisis." *Cf.* Fried and Schultze, eds., *Higher Oil Prices and the World Economy*, 77-78, 86-87, 127, 148 (1975).

Contrary to the petitioners' assertion that the statute does not distinguish between direct and indirect methods of import control, the language of § 1862(b) itself contains the standard by which the exercise of unrestrained and unreviewable powers may be narrowed, *i.e.*, the words "adjust the imports." These words clearly modify and limit the sweeping generality of the preceding language, "take such action . . . as he deems necessary."[29] In the only reported judicial interpretation of these words, Judge McGowan characterized § 1862(b) exclusively as a quota provision:

> [A]ction shall be taken "to adjust the imports" of the article in question, *which means that the article may by regulation be excluded from entry or withdrawal from warehouse*. *Consumers Union of U.S.* v. *Kissinger*, 506 F. 2d 136, 142 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) (quoted with emphasis at Pet. App. 22a).

The limitations inherent in the use of the term "adjust the imports" emerge when one considers the fundamental economic difference between a quota and a tariff (or license fee) as a means of controlling imports.[30] A quota affects imports directly and price only indirectly. A tariff (or license fee) affects price directly and imports only indirectly, through the impact of increased prices on consumer decisions. Only in the case of a quota system does one "adjust the imports" by di-

[29] The words "take such action . . . as he deems necessary" are implementary only and do not constitute an independent grant of authority to take any action other than to carry out the statutory directive "to adjust the imports." *Cf. New England Power Co.* v. *Federal Power Commission*, 467 F. 2d 425, 430-431 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974).

[30] Tariff Commission Report, 113 *et seq.* *See*, Chacholiades, *The Pure Theory of International Trade*, 395. Of course, in the extreme situation, a confiscatory tariff would have the same effect as an embargo, since no one would then import oil into the United States. Although the President theoretically has the power to embargo foreign oil under § 1862(b), this does not imply the power to impose tariffs. The power to destroy does not imply the power to tax.

rectly varying the quota levels; where a license fee or tariff is involved, one "adjusts the tariff" in hopes that import levels will change.

The restrictive meaning of the term "adjust the imports" becomes clearer if one compares the language of § 1862(b) with the language Congress uses when referring to the power to impose duties. Section 1862(a) limits the President's power to decrease or eliminate any "duty or other import restriction" on articles affecting the national security. Congress, if it intended, could have used that language when it enacted § 1862(b) in 1955, by authorizing the President to impose a "duty or other import restriction" to meet a threat to the national security. The term "duty or other import restriction" is a term of art, embracing both a duty and "a limitation, prohibition, charge, and exaction other than duty, imposed on importation or imposed for the regulation of importation" (19 U.S.C. 2481(2)), and is used throughout Title 19.[31]

Throughout the U.S. Code, the term "adjust" is used to denote a fixed, quantitative measure. Nowhere in the Code does the term refer to a measure which by a series of intervening causes seeks to achieve an uncertain objective.[32] In contrast, a tariff or license fee is a notoriously imprecise and indirect method of controlling imports — a bludgeon rather

[31] Prior to the Trade Act of 1974, the term could be found in 19 U.S.C. 1351(a)(1), 1360(a), 1841(a), 1844, 1845, 1845(a), 1861(a), 1881 and 1882(a)(3) (1841-61, 1881-82 repealed by P.L. 93-618).

[32] The term "adjust" or its variants is used throughout the Internal Revenue Code in a fixed, quantitative sense ("adjusted gross income," "adjusted basis," "adjusted sales price," etc.). Other examples include "adjustment" of rates of compensation (2 U.S.C. 61c-1; 5 U.S.C. 5348), accounts (2 U.S.C. 81b), insurance premium rates (5 U.S.C. 8714), interest rates (7 U.S.C. 903), agricultural allotments (7 U.S.C. 1132), agricultural prices (7 U.S.C. 1301), farm quotas (7 U.S.C. 1326), military rank (10 U.S.C. 5767), claims (10 U.S.C. 2734), rental charges (12 U.S.C. 1701s), financial statements (12 U.S.C. 1726), odometer readings (15 U.S.C. 1987), boundaries (16 U.S.C. 81m), value of merchandise (19 U.S.C. 170a), industrial disputes (29 U.S.C. 151), weights (31 U.S.C. 348, repealed), annuities (45 U.S.C. 228f), and government contract prices (50 U.S.C. App. 1231).

than a scalpel.[33] In the area of national security, a monetary exaction as opposed to a quota is a particularly undesirable method of import control.[34]

Unlike a fee or tariff, a quota may discriminate among foreign import sources without fear of violating international obligations such as the General Agreement on Treaties and Tariffs[35] or most-favored-nation provisions of treaties.[36] Unlike a fee or tariff, a quota may discriminate among domestic users without fear of violating the uniformity clause of the Constitution.[37]

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[33] *See, e.g.*, Affidavit of Wassily Leontief, A. 186.

[34] In the words of the Senate Finance Committee:

> There are serious practical problems in substituting a tariff for a quota in the regulation of oil imports. The volatility of freight rates, the geographic distribution of the world's oil reserves, and various pricing and taxing policies by foreign governments are important factors which would make the substitution of tariffs to regulate oil imports very costly and inefficient. No tariff can be so scientifically set as to reasonably regulate the level of imports in accordance with the needs of national security. . . . [W]henever a national security matter is concerned importations of the commodity involved should be set at a level so as to provide a reasonable degree of certainty that they will not impair the national security. This cannot be done effectively by a tariff or duty scheme. S. Rep. No. 91-1431, 91st Cong., 2d Sess. 251 (1970). *See also*, 116 Cong. Rec. 41807, December 16, 1970 (comments of Senator Long).

[35] 61 Stat. Parts 5 and 6 (1947). Under GATT all trade negotiations center on mutual *tariff* reductions. In emergencies, when trade policy considerations give way to overriding national security interest, *quantitative* restrictions (*i.e.*, quotas) are the accepted device. In this regard the Oil Import Program has been internationally justified under the article entitled "Security Exceptions." *See* Tariff Commission Report 99-109; Dam, *The GATT, Law and International Economic Organization*, 148-66 (1970); Jackson, *World Trade and the Law of GATT*, 681-687 (1969).

[36] Tariff Commission Report 108-109, citing bilateral treaty obligations with Iran, Iraq, Saudi Arabia and Venezuela.

[37] U.S. Const., art. I, § 8, cl. 1. ("all Duties, Imports and Excises shall be uniform throughout the United States"). *See* Section IID 2, *infra*. As the Tariff Commission Report points out:

> [T]ariffs are administratively less flexible than quotas because . . . they invite scrutiny for conformity with GATT rules, whereas quotas operate under [no such] constraint. Moreover, because of the absence of these constraints, quotas can be used as instruments of policy-oriented discrimination among import sources and/or domestic importers. It should also be noted that tariffs are more likely to run into constitutional difficulties than quotas, since the former are subject to a uniformity requirement not applicable to quotas. P. 123.

Tariffs, license fees, and other indirect methods of import control invariably have far-reaching and unpredictable effects upon the economy. Indeed, a quota system and a tariff system would operate differently in the circumstances of this case. The stated objective of the President's program is to limit imports of oil by 500,000 barrels per day (A. 249, 269), about 8½ per cent of the Nation's daily imports during 1974 (A. 176).[38] These reductions could have been accomplished precisely by a quota system,[39] without large-scale disruption to the economy in the Northeast. However, the President opted for an enormous increase in the import license fees which, among other things: (a) substantially increased governmental revenues, thus channelling funds from the private sector to the public sector; (b) resulted in substantial increases in domestic prices for oil and oil products by removing foreign oil from effective price competition with domestic oil; and (c) in fact fell far short of the desired goal of effecting reductions in petroleum imports.[40]

In enacting § 1862(b) in 1955, Congress directed the President under appropriate circumstances only to adjust imports, *i.e.*, to increase or decrease the supply of foreign commodities.

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[38] The reason a large increase in price is required to produce a small decrease in demand is that demand for oil has a very low elasticity. *Cf.* Yager and Steinberg, eds., *Higher Oil Prices and the World Economy*, 227; Von Haberler, *The Theory of International Trade*, 227-232.

[39] A quota of 5.3 million barrels per day (500,000 barrels less than the 1974 levels) would have accomplished this objective precisely.

[40] Crude oil imports in 1975 increased to 4.1 million bbl/day, an 18% increase over the 1974 figure of 3.5 million bbl/day. *FEA Monthly Energy Review* (February, 1976).

Yet the program instituted by President Ford in 1975 was not a program aimed at adjusting foreign supply but rather a program meant to diminish domestic demand. The White House Fact Sheet described the effect of the program as follows:

> [T]he fee will place an upward pressure on the price for crude [oil]. . . . [T]he price of uncontrolled domestic crude will rise to meet the world price. . . . As a result of these measures, petroleum products will become more expensive relative to other goods and services, thereby encouraging conservation and discouraging consumption. (A. 289-290.) *See also*, A. 222, 224.

The President's program was thus designed not to discourage imports, but to increase prices of all oil, foreign and domestic, and thus to encourage domestic energy conservation efforts.[41] It was, in effect, a domestic price decontrol program embarked upon under the guise of an "adjustment" of imports.[42] As

[41] This point is most clearly illustrated by the President's proposal to couple a permanent $2.00/bbl import license fee with an equivalent excise tax on domestic crude oil (A. 270). This scheme is a paradigm of an import duty with no protective effect, *i.e.*, one which does not adjust imports at all. *See* Ellsworth, *The International Economy*, 216 (3d ed. 1967) ("a duty can be made to have no net protective effects if domestic production of the commodity subject to duty also has imposed on it a domestic excise tax equal to the import duty"). The alternative of imposing an excise tax lower than the import fee, which would have some protective effect, was expressly rejected by the White House (A. 294).

[42] At the time the second-tier license fee program was announced, the President declared he would take administrative action to remove domestic price controls on oil, subject to Congressional disapproval under § 4(g) of the Emergency Petroleum Allocation Act, 15 U.S.C. 753 (g) (A. 249-250). The President also sought legislation to impose permanent license fees on imports and excise taxes on domestic oil and natural gas (A. 250), a windfall profits tax (A. 250), and a pass-through of these taxes by permanent tax reductions and payments (A. 252). The license fees imposed under § 1862(b) were to be "interim administrative actions" which would be "rescinded when the necessary legislation is enacted" (A. 232). This legislation was never enacted.

such, the President's program is in irreconcilable conflict with the price control program mandated by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq*. That Act directs the President to "strike an equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of an adequate supply of product and of holding down spiraling consumer costs." *Consumers Union of U.S.* v. *Sawhill*, 525 F. 2d 1068, 1074 (T.E.C.A. 1975), citing H.R. Rep. No. 93-628, 93d Cong., 2d Sess. 26 (1974).

In the *Consumers Union* case the court of appeals *en banc* held that the two-tier price control program imposed by the FEA (and described at A. 327-332) conformed with the legislative mandate, even though the prices of certain types of domestic oil were allowed to float with the market price. However, the court cautioned that:

> this is not to say that FEA may, consistent with its statutory responsibilities, unilaterally implement changes in its regulatory scheme not contemplated by Congress and not reflective of a balancing approach. *Id.*, at 1071.

The action of the FEA in artificially raising the prices of domestic and imported oil by over 20 per cent above the market price[43] cannot be considered to be in conformity with the statutory directive to consider "holding down spiraling consumer costs."

[43] The second-tier license fee program was predicted to raise domestic prices by five cents a gallon or about $2.10 per barrel (A. 291). This would be a 21% increase over the $10.00 per barrel price for uncontrolled domestic oil in effect on the date of Proc. 4341 (A. 330).

The conflict between the license fee program and federal price control legislation is even more apparent under the Energy Policy and Conservation Act of 1975, P.L. 94-163. That Act requires the President to promulgate rollback ceiling prices resulting in a weighted average sales price for crude of $7.66 per barrel, subject to upward adjustments not to exceed 10 per cent *per annum*. It is true that the President removed the supplemental license fee as soon as this Act was passed (Proc. 4412, 41 Fed. Reg. 1037). Had he not done so, he would have been in the untenable position of (a) imposing price controls required by the Act and (b) cancelling the effect thereof by effecting price increases on imported oil.

It is not respondents' role to question in this forum the wisdom of the President's economic and energy programs. But respondents do urge that Congress, when it enacted § 1862(b) in 1955, never intended the narrow power to adjust imports to be a charter for the implementation by the executive branch of a new national economic and energy policy.

C. *Authority To Impose Import License Fees May Not Be Implied Without A Clear Statutory Directive.*

The court of appeals determined that the import license fee program is "substantively a duty system" (Pet App. 26a), a result not seriously disputed by the petitioners (Pet. Br. 19). Section 1862(b) nowhere mentions the terms "duty," "tax," "tariff" or "license fee." Any authority for the imposition of such exactions must therefore be derived by implication from the general language of that section.

The absence of explicit reference to the tariff power in § 1862(b) is fatal to the petitioners' claim for two reasons. First, as a general principle of statutory interpretation, the power to tax may not be implied without a clear directive from Con-

gress. Second, the history of tariff and trade legislation manifests a consistent Congressional intent to guard its taxing power jealously. To interpret § 1862(b) to authorize the imposition of massive fees would be contrary to this manifest intent.

1. A Delegation Of The Taxing Power Requires A Clear Statement From Congress.

In certain situations a legislative body which desires to exercise or delegate a power must do so plainly and unmistakably. For example, statutes in derogation of the common law or statutes imposing penal sanctions are construed strictly. *See*, 3 Sutherland, *Statutory Construction*, Chapters 59, 61, 62 (4th ed. 1973). It is likewise an established principle of statutory construction that statutes delegating the taxing power are to be narrowly construed. *Id.*, § 66.05. These rules of strict construction embody a public policy of "clear statement," which:

> forbids a court to understand a legislature as directing a departure from a prevailing principle or policy of the law unless it does so clearly. This policy has special force when the departure is so great as to raise a serious question of constitutional power. Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, p. 1413 (Tent. Ed., 1958).

As expressed by this court in *Girouard* v. *United States*, 328 U.S. 61, 64 (1946), the policy of clear statement requires that the courts:

> not assume that Congress intended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms.

In the recent case of *National Cable Television Assn.* v. *United States*, *supra*, at note 22, this Court affirmed in language virtually identical to that used in *Girouard* — that it would be "a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power . . ." (*Id.*, at 341).[44] That case involved the validity of "runaway" license fees which exceed the value to the recipient of the governmental services provided, and which thus invade the taxing power entrusted to Congress. The Independent Offices Appropriation Act of 1952, 31 U.S.C. 483a, provided in relevant part that:

> [T]he head of each Federal Agency is authorized by regulation . . . to prescribe . . . such fee, charge or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts. . . .

[44] Throughout our constitutional history the taxing power has been recognized as a dangerous instrumentality, the exercise of which must be carefully controlled. In Chief Justice Marshall's indelible words, "the power to tax involves the power to destroy." *M'Culloch* v. *Maryland* 17 U.S. (4 Wheat.) 316, 431 (1819).

That power has been entrusted by Article I, § 8, cl. 1, of the Constitution to the Congress, as the deliberative and representative branch of government, rather than to the Executive, because of the potential for its tyrannical exercise. *See*, Locke, *The Second Treatise of Civil Government*, § 140 (Laslett ed., 1960); Montesquieu, *The Spirit of the Laws*, Bk. XI, ch. 6; Fisher, *President and Congress*, 86 (1972); Crosskey, *Politics and the Constitution*, 494-5 (1953).

The Federal Communications Commission relied upon the general language of that statute as authority to impose annual "fees" on CATV systems at the rate of $.30 per subscriber. Such fees were expected to produce $1,145,400 in revenues annually. 415 U.S. at 340.

This Court held that the fees there imposed were so excessive as to go beyond the commonly accepted meaning of a fee. Applying the principle that a delegation of the taxing power requires a clear statement from the Congress, this Court held the fees invalid as beyond the scope of the Act:

> It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read 31 U.S.C. § 483a narrowly as authorizing not a "tax" but a "fee." . . . The [statutory language] "public policy or interest served, and other pertinent facts," *if read literally*, carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House. 415 U.S. at 341 (emphasis in original).

Likewise, in *Federal Power Commission* v. *New England Power Co.*, *supra*, at note 22, this Court construed the Independent Offices Appropriations Act to authorize only fees bearing a reasonable relation to benefits conferred by governmental activity:

> Though [this construction] greatly narrows the Act from the dimensions urged by the Commission, it keeps it within the boundaries of the "fee" system and away from the domain of "taxes" toward which the Commission's "economic climate" argument would lead. 415 U.S. at 351.

The license fees involved in this case, like those involved in the *National Cable Television* and *New England Power* cases, are "runaway" license fees which exceed the value of the benefit conferred upon the recipient. Unless restrained by a narrow reading of § 1862(b), such fees will trespass upon the taxing power.

A license fee is normally a charge imposed by a sovereign for the exercise of a privilege.[45] In determining whether a license fee is valid, the courts will look to substance rather than form. *License Tax Cases*, 72 U.S. (5 Wall.) 462 (1866); *Cooley* v. *Bd. of Wardens*, 53 U.S. (12 How.) 299, 314 (1851); *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 444 (1827). To hold that the license fee system under consideration here represents true "license fees" would exalt form over substance. Rather, they are license fees stretched beyond their limited permissible function.

The court of appeals stated that it could "see no logical or realistic basis of disputing the Tariff Commission's comment that 'the new program is substantively a duty system'" (Pet. App. 26a). The Tariff Commission Report, after an extensive consideration of the legal basis for the imposition of import license fees, concludes that:

[45] The case of *National Biscuit Co.* v. *City of Philadelphia*, 374 Pa. 604, 98 A. 2d 182, 188 (1953), provides a useful definition of a license fee, as follows:

> The distinguishing features of a license fee are (1) that it is applicable only to a type of business or occupation which is subject to supervision and regulation by the licensing authority under its police power; (2) that such supervision and regulation are in fact conducted by the licensing authority; (3) that the payment of the fee is a condition upon which the licensee is permitted to transact his business or pursue his occupation; and (4) that the legislative purpose in exacting the charge is to reimburse the licensing authority for the expense of the supervision and regulation conducted by it.

> [T]he President has created a new mechanism for import adjustment called a license fee. The analysis, however, suggests that what Proclamation 4210 does is substitute a duty system for the quota mechanism of the Mandatory Oil Import Program, for the license fee has the incidences of a duty. The name is new and the administration has been shifted from the Department of the Treasury, [U.S.] Customs Service to the Department of the Interior. Nonetheless, the new program is substantively a duty system. (Tariff Commission Report 97.)

The President's lack of authority to impose import duties cannot be cured by the transparent device of enacting such duties under the title of "license fees." To permit such a scheme would in effect enable the President to disregard stringent statutory and constitutional restraints with regard to the imposition of import duties.

2. The Manifest Intent Of Congress Under The Trade Acts Has Been To Limit The Delegation Of The Tariff Power.

The language employed by the various provisions of the tariff and trade expansion acts clearly demonstrates that Congress, whenever it determines to delegate some of its taxing power to the President, does so in explicit and unambiguous terms.

The court of appeals "generalize[d] from [its] examination of the myriad of trade provisions that congressional delegations have been narrow and explicit in order to effectuate well-

defined goals" (Pet. App. 13a).[46] The contemporaneous or related legislative provisions cited by the court of appeals for this proposition are excerpted in the margin.[47]

[46] For a non-trade illustration of explicit delegation, *see* § 22 of the Agriculture Adjustment Act, 7 U.S.C. 624, authorizing the imposition by proclamation of fees or quotas on agricultural imports.

[47] Section 201 of the Trade Expansion Act of 1962, 19 U.S.C. 1821, which authorizes the President to:

> proclaim such modification or continuance of any existing duty or other import restriction, such continuance of existing duty-free or excise treatment, or such additional import restrictions, as he determines to be required or appropriate to carry out any such trade agreement.

Section 351 of the Trade Expansion Act of 1962, 19 U.S.C. 1981, which authorizes the President, after a Tariff Commission investigation finding injury to domestic industry (under 19 U.S.C. 1901), to:

> proclaim such increase in, or imposition of, any duty or other import restriction on the article causing or threatening to cause serious injury to such industry. . . .

Section 257 of the Trade Expansion Act of 1962, 19 U.S.C. 1351, which authorizes the President to enter into foreign trade agreements, and:

> [t]o proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement. . . .

Section 203 of the Trade Act of 1974, 19 U.S.C. 2253, which authorizes the President to provide import relief to threatened domestic industry, and, in connection therewith, to:

> proclaim an increase in, or imposition of, any duty on the article causing or threatening to cause serious injury to such industry. . . .

Section 201 of the Trade Act of 1974 is remarkably similar to § 1862(b). Under § 201 the International Trade Commission is authorized to make an "investigation to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." Following such finding, the Commission reports to the President who is directed to provide "import relief" to the domestic industry under § 202(a). However, the authority of the President to provide import relief is very clearly and explicitly spelled out in § 203(a). He may:

> (1) proclaim an increase in, or imposition of, any duty on the article causing or threatening to cause serious injury to such industry;
>
> (2) proclaim a tariff-rate quota on such article;
>
> (3) proclaim a modification of, or imposition of, any quantitative restriction on the import into the United States of such article;
>
> (4) Negotiate orderly marketing agreements with foreign countries limiting the export from foreign countries and the import into the United States of such articles; or

Section 122 of the Trade Act of 1974, 19 U.S.C. 2132, which authorizes the President to meet balance-of-payments emergencies, by proclaiming for not more than 150 days:

> (A) a temporary import surcharge, not to exceed 15 percent ad valorem, in the form of duties (in addition to those already imposed, if any) on articles imported into the United States;
>
> (B) temporary limitations through the use of quotas on the importation of articles into the United States; or
>
> (C) both a temporary import surcharge . . . and temporary limitations. . . .

Such specific provisions show that Congress, when it intends to delegate the power to impose duties, does so in explicit terms. The court of appeals concluded that "[f]itted against this scheme, the Government interpretation of § 1862(b) would represent an anomalous delegation of almost unbridled discretion and authority in the tariff area" (Pet. App. 14a). Petitioners concede that "other statutes delegating to the President the authority to impose or alter import controls have frequently circumscribed that authority more narrowly or more explicitly" than § 1862(b) (Pet. Br. 49-50). However, petitioners assert that this "contrast shows that Congress has known how to confine such delegations closely when it has so desired" (Pet. Br. 50). Thus, petitioners conclude, § 1862(b) "was intended to confer the authority exercised by Presidents Nixon and Ford." (*Ibid.*)

Petitioners' conclusion proceeds from an erroneous major premise, *i.e.*, if Congress wishes to preserve its constitutional prerogative to tax, it must hedge broad delegations to the Executive branch with explicit denials of this power. This argument lacks merit. The unfettered delegation of the taxing power to the Executive constitutes a sharp break with our traditions. *National Cable Television*, 415 U.S. at 341. Thus the presumption is precisely contrary to petitioners' assertion.

In *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726 (1973), this Court considered whether an ambiguous "catch-all" provision of the Shipping Act authorized the Federal Maritime Commission to approve acquisition agreements. This Court concluded that:

> [A]n examination of contemporaneous and related statutes makes clear that when Congress intended to bring acquisitions and mergers under control, it did so in unambiguous language. . . .
>
> In light of these specific grants of merger approval authority, we are unwilling to construe the ambiguous provisions of § 15 to serve this purpose. . . . If, as petitioner contends, there is now a compelling need to fill the gap in the Commission's regulatory authority, the need should be met in Congress. . . . We are not ready to meet that need by rewriting the statute and legislative history ourselves. 411 U.S. at 742, 744-745. *See also, Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 733 (1975).

Since Congress has not clearly stated that the President is empowered to impose fees or tariffs, this Court should hold that § 1862(b) does not authorize the action taken under Procs. 4210 and 4341.

D. *Section 1862(b) Must Be Interpreted Narrowly In Order To Avoid Serious Constitutional Questions.*

As expressed by Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936):

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (Brandeis, J., concurring, quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).)

If the President's interpretation of § 1862(b) were accepted, two serious constitutional issues would be raised.

1. The Statute Should Be Construed To Avoid An Unconstitutional Delegation Of The Tariff Power.

If § 1862(b) were given the limitless reading petitioners propose, a serious question of unconstitutional delegation of legislative power would be presented. The *National Cable Television* and *New England Power* cases, *supra*, are pertinent precedents on this issue. The statute construed in *National Cable Television* authorized Federal agencies to impose fees determined:

> to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, *public policy or interest served, and other pertinent facts*. . . . 31 U.S.C. 483a (emphasis supplied).

The Court held there that such standards were so imprecise as to pose a serious constitutional question under the delegation doctrine:

> Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems.[48]

[48] 415 U.S. at 342, referring to *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Hampton & Co.* v. *United States*, 276 U.S. 394 (1928).

The standards provided in § 1862 are no less imprecise. The President is authorized under § 1862(b) to "take such action, and for such time, as he deems necessary to adjust the imports of such article. . . ." Section 1862(c) is similarly broad. It instructs the President to consider "*without excluding other relevant factors*" (emphasis supplied) such matters as domestic production, domestic capacity, human resources, products, raw materials, industrial growth, investment, exploration, development, the economic welfare of domestic industries, unemployment, decrease in government revenues, loss of skilled employees, and weakening of the internal economy. These factors taken together amount to a consideration of the economic welfare of the nation as a whole. They rival in breadth the provisions of the National Industrial Recovery Act of 1933 struck down in *Schechter*.

The viability of the delegation doctrine has been questioned by some commentators, particularly Professor Kenneth Culp Davis.[49] However, as the *National Cable Television* case demonstrates, "the reports of its death are greatly exaggerated." The vitality of the doctrine has been expressed of late not in the dramatic invalidation of statutes by the judiciary, but in the preservation of their constitutionality by strict judicial interpretation. Professor Jaffe calls this process "the technique of *Kent* v. *Dulles*." Jaffe, *Judicial Control of Administrative Action* 72 (1965). In *Kent* v. *Dulles*, 357 U.S. 116 (1958), Rockwell Kent was denied a passport because he was a Communist. The Secretary of State asserted that under the relevant statute the power to issue passports was "wholly discretionary." This Court, citing *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 420-430 (1935), held that the statute must be narrowly interpreted to avoid constitutional challenge. In Professor Jaffe's words:

[49] 1 K. Davis, *Administrative Law Treatise* 76 (1958); *cf.* H. Friendly, *The Federal Administrative Agencies: The Need for a Better Definition of Standards* 21 (1962).

> Here the interpretative process is used to provide a standard in order to save the statute from the condemnation of excessive delegation. Thus paradoxically a power unlimited in terms is given a very restricted meaning — a meaning deduced from the ostensible purpose of the statute or from the particular practices which have prevailed under it. Jaffe, *op. cit.*, at 73.

If it can be said that no statute delegating the *commerce* power has been held unconstitutional under the *Schechter* doctrine in recent years, it can be said with equal vigor that no statute involving as broad a claimed delegation of the *taxing* power as § 1862(b) has ever been upheld. The delegation doctrine as applied to the taxing power is particularly stringent. This principle is summarized in *Star-Kist Foods, Inc.* v. *United States*, 275 F. 2d 472 (C.C.P.A. 1959), as follows:

> A constitutional delegation of powers requires that Congress enunciate a policy or objective or give reasons for seeking the aid of the President. In addition the act must specify when the powers conferred may be utilized by establishing a standard or "intelligible principle" which is sufficient to make it clear when action is proper. And because Congress cannot abdicate its legislative function and confer carte blanche authority on the President, it must circumscribe that power in some manner. This means that Congress must tell the President what he can do by prescribing a standard which confines his discretion and which will guarantee that any authorized action

> he takes will tend to promote rather than flout the legislative purpose. 275 F. 2d at 480.[50]

Section 1862(b) gives the President no guidance as to the rate of tax or method of determining a tax to be imposed.

This Court should preserve the constitutionality of § 1862(b) by interpreting it not to authorize the imposition of fees or tariffs. Such an interpretation would reflect not only the general presumption that Congressional acts are constitutional, but also the intention of Congress, expressed in debate and reflected in legislation, that the powers delegated to the President under the tariff acts should be tightly confined.[51]

[50] In *Pan American Standard Brands, Inc.* v. *United States*, 177 F. Supp. 769 (Cust. Ct. 1959), the Puerto Rico legislature, acting pursuant to provisions of the Tariff Act of 1930, imposed a duty on coffee, and empowered the Secretary of Agriculture and Commerce to increase or decrease such duty in any amount "when market conditions may warrant it and for the purpose of protecting the consumer or the coffee industry."
The court there held the "market conditions" standard too indefinite to meet the *Schechter* test:

> The Act contains no definition of circumstances or conditions which would call for the exercise of the delegated power by the Secretary to protect the consumer or the coffee industry. No standard is provided to aid him in determining when market conditions may warrant action. *There is no standard* to which the Secretary must conform in his determination of the rates to be imposed under the tariff-fixing power. 177 F. Supp. at 775.

[51] *See*, Senator Ervin's lengthy exegesis to that effect during the debate on the Trade Agreements Extension Act of 1958. 104 Cong. Rec. 10463-64 (1958). The same concern was manifested during debate on the Trade Expansion Act of 1962. Representative Wright of Texas commented:

> Members of the committee are surrendering no congressional control. We are delegating under the Constitution those duties which we are charged by the Constitution with delegating. We are delegating them with certain clearly prescribed congressionally imposed limitations upon Presidential authority. 108 Cong. Rec. 12057.

Other provisions of the tariff and trade statutes of the United States existing at the time § 1862(b) was enacted illustrate proper methods of limiting executive power by circumscribing its exercise. Several of those statutes are excerpted in the margin.[52] Accordingly, § 1862(b) should be interpreted

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In a similar vein Senator Humphrey commented:

> There are those who charge that the Trade Expansion Act would result in the full and complete abandonment of the constitutional authority of Congress to regulate tariffs. This act would do nothing of the kind. What it does is to continue for a limited fixed period the delegation of authority to set tariff rates within limits defined by Congress and with well-established safeguards that have been in effect since 1934. 108 Cong. Rec. 19867.

The most recent expression of Congressional concern and sensitivity to the constitutional issues presented by the delegation of powers under trade legislation may be found in the Senate Finance Committee Report on the Trade Act of 1974. In explaining why numerous amendments to the House bill were required, the Committee states:

> As passed by the House, the bill represented the largest delegation of trade negotiating authority to the Executive in history. The Finance Committee's amendments seek to establish appropriate and constitutionally-sound guidelines and criteria to govern the exercise of the authority granted by the bill. S. Rep. No. 93-1298, 93d Cong., 2d Sess. 14 (1974).

[52] The Antidumping Act, as amended, 19 U.S.C. 160 *et seq.*, authorized the President to impose a special dumping duty equal to the difference between the price of the article in the country of origin and the lower export price to the U.S. market.

The provisions of the Tariff Act, 19 U.S.C. 1303, authorized the President to impose a special "counter-vailing duty" equal to the net amount of the "bounty or grant" paid or bestowed by the foreign country in respect to such articles.

The "escape clause" provisions of the Trade Agreement Extension Act of 1955, 19 U.S.C. 1981(b), authorized the President to increase existing rates of duty on imported articles up to 50% above the rate existing on July 1, 1934.

to preclude the imposition of fees, in order to obviate problems of constitutionality and give effect to the manifest legislative intent under the trade agreements acts.

2. The Import License Fee System Would Contravene The Constitutional Requirement That All Import Duties Be Uniform Throughout The United States.

The interpretation of § 1862(b) advanced by petitioners would give rise to a claim that the imposition of import license fees under Proc. 4210 violates the uniformity clause of the Constitution. Article I, § 8, cl. 1, of the Constitution requires that "all Duties, Imposts and Excises shall be uniform throughout the United States." The purpose of this clause is to protect the States, which united in forming the Constitution, from discrimination by Congress. *Downes* v. *Bidwell*, 182

The "flexible tariff" provisions of the Tariff Act, 19 U.S.C. 1336, authorized the President to impose a duty equal to the difference in the foreign and domestic costs of production of the article.

Section 22 of the Agricultural Adjustment Act of 1933, 7 U.S.C. 624, authorized the President to impose fees on imported agricultural commodities not in excess of 50% *ad valorem*.

Petitioners cite the "escape clause," § 351 of the Trade Act of 1974, 19 U.S.C. 1981, and the Trading With the Enemy Act, 50 U.S.C. App. 5(b), as examples of broad delegations of the taxing power (Pet. Br. 50-51). Neither statute is relevant to this inquiry. As petitioners admit, the escape clause contains an *explicit* delegation of the taxing power and is hedged with restrictions on the amount of tax which may be imposed (Pet. Br. 51-52). Whether the Trading With the Enemy Act authorizes the President to impose a tax is still an issue unsettled by this Court. In *United States* v. *Yoshida International*, 526 F. 2d 560 (C.C.P.A. 1975), the Court of Customs and Patent Appeals held that the Trading With the Enemy Act authorized the President to impose a "limited surcharge" within the existing tariff limits. In the court's words, this "is quite different from 'imposing whatever tariff rates he deems desirable.'" 526 F. 2d at 579.

U.S. 244 (1901). Consistent with these purposes, the clause has been interpreted to require that duties, imposts and excises be applied uniformly to the several States, regardless of the differing burdens or effects upon individuals in different parts of the United States which may result from local differences.

The import license fee system employed by the President artificially classifies the States into five geographical districts[53] and imposes a fee on the quantity of oil imported, on a per barrel basis, into each of the districts. The import fee system directly discriminates among these districts by unequally allocating to each district the amount of fee-free oil which may be imported.[54] Once these fee-free allocations for states in one district are exhausted, import fees are imposed. At the same time, however, the importation of the same item in other States will not be taxed as a result of the discriminatory classification system.

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[53] Proc. 4210, §§ 15(b)-(e).

[54] Presidential Proclamation 3279, as amended through January 23, 1975, allocates fee-free oil as follows:

> Districts I-IV are allowed 1,992,000 average barrels of crude oil, unfinished oils, and finished products (other than residual oil to be used as fuel) per day per year, with special provisions for additional 50,000 barrels of No. 2 fuel in District I, § 2(a)(1);
>
> District V receives 670,000 average barrels per day per year, § 2(a)(2);
>
> Puerto Rico receives 227,221 average barrels per day per year, § 2(a)(3);
>
> District I receives 2,900,000 barrels of residual oil to be used as fuel per day per year, § 2(a)(4);
>
> Districts II-IV receive 42,000 barrels, § 2(a)(5);
>
> District V receives 75,600 barrels, § 2(a)(6).

The Tariff Commission has pointed out that the present import fee system will result in different import duties on the same item in different ports, directly as a result of geographic location in the United States:

> This [license fee system] violates the requirement of geographic uniformity, because the result is different duties in two ports on the same item the item being the xth barrel of oil. [i.e.: the point where exemptions expire for certain States]. Tariff Commission Report 99.

Thus, even if the President had been delegated the Congressional power to impose license fees, he would be in violation of the Constitution as a result of this discriminatory classification system. Section 1862(b) should therefore be interpreted so as to authorize the President to impose only direct import restrictions rather than "license fees."

E. *The Legislative History Demonstrates That Congress Did Not Intend To Delegate Authority To Impose A License Fee System Under § 1862(b).*

It is a proper and established rule of statutory construction that courts should look to the legislative history of a statute to determine its meaning. As the leading text on statutory construction declares:

> Such aids consist of background information about the circumstances out of which arose the generative forces which led to the enactment of a statute, events surrounding its enactment, and developments pertaining to its subsequent operation. All of these facts, taken together, can be said to comprise the history of a statute. . . .

> Probative historical data may be found in either legislative, executive, judicial, or nongovernmental sources. 2A Sutherland, *Statutory Construction*, § 48.01 (4th ed. 1973).

The petitioners' argument assigns considerable weight to two brief and equivocal statements made by individual legislators during the floor debate on the Trade Agreements Extension Act of 1955. These statements are said to support the petitioners' position that § 1862(b) constitutes a delegation of the taxing power. Respondents disagree. These comments must not be viewed in isolation, but rather in the context of the entire legislative history of that Act and in the broader context of the history of the United States trade policy in general. Viewed from these perspectives, these isolated remarks shrink to minor importance.

Moreover, the serious constitutional questions discussed in Section IID, *supra*, require the petitioners to sustain a heavy burden in establishing that the legislative history supports their interpretation of § 1862(b). As this Court recently observed in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974):

> "[w]hen one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if language, . . . and arguably the legislative history point somewhat more strongly in another way." Quoting district court opinion, 384 F. Supp. at 946.

1. The History Of The Tariff And Trade Expansion Acts Negates Any Claim Of License Fee Power Under § 1862(b).

The predecessor to § 1862(b) was first enacted as part of the Trade Agreements Extension Act of 1955. This Act was the tenth act extending the Trade Agreements Act of 1934. These acts and their three successors[55] explicitly refer back to the Smoot-Hawley Tariff Act of 1930, c. 497, 46 Stat. 590, as their foundation. Section 1862(b) can be properly construed only within the framework of this tightly integrated series of legislative acts and the consistent themes sounded in their legislative history.

Viewed in this historical context, it becomes evident that § 1862(b) represents an isolated exception to the national trade policy of progressive reduction in tariff barriers. It would make the exception swallow the rule to construe § 1862(b) as authorizing the President to impose fees unlimited in amount, thus circumventing and frustrating the purpose of the trade expansion acts.[56]

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[55] Trade Agreements Extension Act of 1958, P.L. 85-686; Trade Expansion Act of 1962, P.L. 87-794; Trade Act of 1974, P.L. 93-618.

[56] This Court has recently reasserted the principle of statutory construction involved here, viz., that language of one provision of an Act of Congress which appears to grant broad discretion to the Executive cannot be read in such a way as to circumvent the balance of the Act. In *Train* v. *City of New York*, 420 U.S. 35 (1975), this Court considered the construction of § 207 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.*, which "authorized to be appropriated" amounts "not to exceed" $5 billion, $6 billion and $7 billion for the fiscal years 1973, 1974 and 1975. The President had construed the terms "not to exceed" to grant executive discretion to impound any portion of these maximum appropriations.

There are a number of parallels between the impoundment case and the present action. In both, the controversy involved a governmental power vested by the Constitution exclusively in Congress. In both, the

The history of United States trade policy reflects a retreat from the rigid protectionism reflected in the Smoot-Hawley Act of 1930, c. 497, 46 Stat. 590, toward a policy of reduction in tariffs through reciprocal trade agreements between the United States and its trading partners.[57] Nineteenth century United States trade policy was dominated by a philosophy of developing American self-sufficiency through protecting our infant industries from foreign competition. By the late nineteenth century our domestic economy had developed to the point where a general national policy in favor of free competition was in force. That policy was most clearly expressed by the enactment of the Sherman Act in 1890.

Political forces favoring a nondiscriminatory trade policy of lower tariffs and lower domestic prices, led by Congressman Cordell Hull, had introduced legislation as early as 1916 for reciprocal reduction of tariffs through trade agreements. Such efforts were vigorously opposed by protectionist forces which generally prevailed in increasing tariff levels. The United States tariff wall reached the highest levels in the Fordney-McCumber Act of 1922, c. 356, 42 Stat. 858, and the Smoot-Hawley Act of 1930, resulting in protests and retaliatory meas-

Government claimed a delegation of broad executive authority under a particular provision incongruous with the Acts as a whole. In both, the Government further contended that executive discretion was not judicially reviewable. This Court concluded as follows:

> We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and obligation. Yet such was the Government's position in the lower courts — combined with the argument that the discretion conferred is unreviewable. 420 U.S. at 45-46.

[57] This discussion is based in large part upon the brief but excellent history of U.S. trade policy contained in Metzger, The Trade Agreements Program (in Surrey and Shaw, *International Business Transactions*, 1963). *See also*, Bronz, *The Tariff Commission as a Regulatory Agency*, 61 Colum. L. Rev. 463 (1961); Metzger, *United States Foreign Trade: Past, Present and Future*, 6 Vill. L. Rev. 503 (1961).

ures by other countries. For example, in one year Switzerland's exports to the United States fell 30.5 per cent and her imports from the United States fell 29.6 per cent. The United Kingdom enacted retaliatory tariffs in 1931 and extended the tariff wall around the British Commonwealth by the Ottawa Agreement of 1932. The United States' share of world trade fell by almost 30 per cent from 1929 to 1933.

With the advent of the Roosevelt Administration and the enactment of the Trade Agreements Act of 1934, the national tariff policy commenced a gradual reversal from extreme protectionism toward expansion of foreign trade and lowering of tariffs. The Trade Agreements Act of 1934 authorized the President to enter into reciprocal trade agreements whenever he found that existing tariff barriers were unduly burdening foreign trade. The Act limited these reductions to 50 per cent of the 1934 (Smoot-Hawley) levels. The Trade Agreements Act of 1934, and each of its successors, delegated tariff-cutting authority to the President on a temporary basis, for periods of from one to four years. From 1934 to 1955 there were ten amendments and extensions of the Trade Agreements Act.[58]

In the Trade Agreements Extension Act of 1945 further reductions in tariffs were authorized by delegating to the President the power to reduce duties by 50 per cent of the 1945 rates. Thus, if a rate had already been reduced by 50 per cent of the Smoot-Hawley rates, it could be further reduced to 25 per cent of the Smoot-Hawley rates. The Trade Agree-

[58] Trade Agreements Extension Act of 1937, c. 22, 50 Stat. 24;
Trade Agreements Extension Act of 1940, c. 96, 54 Stat. 107;
Trade Agreements Extension Act of 1943, c. 118, 57 Stat. 125;
Trade Agreements Extension Act of 1945, c. 269, 59 Stat. 410;
Trade Agreements Extension Act of 1948, c. 678, 62 Stat. 1053;
Trade Agreements Extension Act of 1949, c. 585, 63 Stat. 698;
Trade Agreements Extension Act of 1951, c. 141, 65 Stat. 72;
Trade Agreements Extension Act of 1953, c. 348, 67 Stat. 472; and
Trade Agreements Extension Act of 1954, c. 445, 68 Stat. 360.

ments Extension Act of 1955, c. 169, 69 Stat. 162, authorized a further tariff reduction of 15 per cent. The Trade Agreements Extension Act of 1958, P.L. 85-686, authorized further tariff cuts of up to 20 per cent. The Trade Expansion Act of 1962, P.L. 87-794, authorized further reductions up to 50 per cent. The Trade Act of 1974, P.L. 93-618, authorized further decreases of up to 40 per cent.

Against this background of a gradual ratcheting-down of tariff barriers, it becomes evident that § 1862(b), added in 1955, represented a special exception to the national trade policy embodied in the Trade Agreements Act and the ten preceding extension acts. Its purpose was to prevent the lowering of trade barriers and the obligations of reciprocal trade agreements from impairing the national security.

The Smoot-Hawley tariff rates remain the touchstone of our tariff structure. As subsequently modified by reciprocal trade agreements, they still represent the basic tariff rates of the United States. 19 U.S.C. 1202. The Smoot-Hawley Act, like any tariff act, represents a Congressional accommodation between the benefits of protectionism and the burdens of taxation and higher prices occasioned by such protectionism. The Smoot-Hawley rates on crude oil, as set forth in the Tariff Schedules of the United States, are 0.5 cents per gallon or approximately 21 cents per barrel. T.S.U.S., Sched. 4, Pt. 10. The rates of duty set forth in those schedules reflect a Congressional determination made in 1930 under Article I, § 8, cl. 1, of the Constitution, of the sort described in *National Cable Television*, *supra*:

> The lawmaker may, in light of the "public policy or interest served," make the assessment heavy if the lawmaker wants to discourage the activity; or it may make the levy slight if a bounty is to be bestowed. . . . 415 U.S. 341.

The actions of the President in Procs. 4210 and 4341 have therefore had the effect of using an exception to the national trade policy to impose rates of duty on oil over sixteen times greater than the highest previous levels in history. The fees authorized by Proc. 4341 were projected to raise approximately $4.8 billion per year, which is greater than the total revenues raised by the United States tariff system for fiscal 1974. In adopting Proc. 4341 the President thus frustrated the Congressional policy manifested in every piece of trade legislation since 1930 that the burdens of taxation and higher prices occasioned by Smoot-Hawley should not be increased.

One cannot read the record of Congressional debate of the Trade Agreements Acts during the post-war period without being struck by the clash of powerful opposing philosophies.[59] With each renewal the battle was joined again between the Protectionists who considered any foreign trade concessions inimical to national security and the Free Trade Advocates who sought the objective of U.S. world trade preeminence. In each of the years in which the Trade Acts were renewed, Protectionist Congressmen inveighed at length against the unconstitutionality of delegating to the executive branch the exclusive Congressional power to levy taxes and duties and to

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[59] Senator Mansfield in the 1955 Congressional debate commented:

> H.R. 1 has become the occasion for an old-fashioned, knockdown, drag-out, protectionist free-trade fight. . . . Opponents of the trade program often argue that tariff reduction in industries essential to national defense in time of war, endanger our mobilization base. . . . Since the introduction of H.R. 1 on the first day of the 84th Congress, the Nation's Capital has been bombarded with "protectionist" groups seeking to subordinate vital American interests to the creation of privileged, noncompetitive positions for a few industries. . . . These protectionists would cut off many imports. In short, they would insist that we use up our own scarce resources, rather than draw them to the fullest economical extent from nations more willing to sell from their own abundance. 101 Cong. Rec. 5312.

regulate foreign commerce.[50] In response, the proponents of the trade bills repeatedly claimed constitutional validity on the grounds that the language of the Act was specific and limited as to any authority delegated.[51]

The national security provision of § 1862(b) emerged as a product of the tension between these opposing philosophies. In effect, § 1862(b) represented a concession to the Protectionist wing of the Congress. As a consequence, to take § 1862(b) as authorization for the unprecedented import fees of Proclamations 4210 and 4341 would violate the Congressional intent from the vantage point of either the Protectionist or the Free Trade wings of the Congress which passed the Acts. Such a construction goes directly against the Protectionist rejection of any sweeping delegation of Congressional power to the President. It also abandons the Free Trade policy of employing presidential discretion to meet particular crises with minimal interference with international trade. It is unrealistic to imagine, as petitioners claim, that the Free Trade group of Congressmen would have given the President unlimited power to undo the progress of twenty years in removing trade barriers, or that the Protectionists would have granted such sweeping executive powers, without fierce debate.

As Mr. Justice Marshall observed in a related context, concurring in *Federal Power Commission* v. *New England Power Co.*, and dissenting in *National Cable Television Assn.* v. *United States*, 415 U.S. 345, 338, 357 (1974):

[50] *See, e.g.*, comments of Representative Bow of Ohio, 101 Cong. Rec. 1739-43, esp. at 1740; Minority Views of Senator Malone of Nevada, S. Rep. No. 232, 84th Cong., 1st Sess. (1955); comments of Sen. Malone, 101 Cong. Rec. 5396-5418, 5540-62.

[51] *See, e.g.*, comments of Rep. Wright of Texas and Sen. Humphrey of Minnesota, *supra*, at note 51.

> I see nothing in the legislative history which suggests any broader interpretation. . . . On the contrary, since the broader view . . . would have represented a controversial policy choice, *I think that the very lack of debate over this provision of the Act and the ease with which it passed compel the more limited interpretation.* (Emphasis supplied.)

2. The Legislative History Of § 1862(b) Negates Any Implication Of A License Fee Power Under That Section.

Representative Mills, a member of the Conference Committee at the time of the enactment of § 1862(b), has described the intent of Congress as follows:

> *We never intended any such use of tariff adjustments.* Whenever an industry essential to national defense was being impaired by imports *we intended that that injury be eliminated immediately in the interest of national defense through the use of a quota*. . . . 116 Cong. Rec. 37848 (emphasis supplied).

In their pursuit of limitless executive powers, petitioners profess to find support in the legislative history, citing several statements of individual Congressmen made during debate.[52]

[52] Petitioners, it should be noted, take a position here in fundamental disagreement with even the dissent in the court of appeals. The most that Judge Robb could say for the petitioners' argument on this point was that "the legislative history of Section 232 [19 U.S.C. 1862(b)] is hopelessly ambiguous and inconclusive" (Pet. App. 31a).

These statements are isolated and atypical. In some instances they are lifted out of a context which clearly supports the opposite interpretation. The proper characterization of legislative intent is that expressed by Representative Mills.

The legislative history of § 1862(b) shows that, at the time of its enactment in 1955, it was perceived only as a provision for quotas. Upon three occasions in subsequent years, Congress rejected proposed amendments to § 1862(b) which would have authorized the imposition of tariffs. On one occasion, in response to the published suggestion to the contrary by a cabinet task force, committee reports of both Houses of Congress specifically declared that § 1862(b) did not authorize the presidential imposition or increase of duties or fees. Since the issuance of Procs. 4210 and 4341, Congress has consistently sought to negate such presidential impositions.

a. THE TRADE AGREEMENTS EXTENSION ACT OF 1955.

Section 1862(b) originated in 1955 as a Senate amendment to a House bill (H.R. 1)[63] extending for three years the Presi-

[63] The national security provision was one of two controversial amendments added by the Senate Finance Committee to H.R. 1 (§§ 6 and 7 of H.R. 1 as reported by the Senate Committee). The other major amendment was a substantial rewording of the existing "escape clause" provision, the purpose of which was to lessen the burden of proof to be satisfied by domestic industries seeking relief for injuries suffered as a result of trade agreement concessions. Under the escape clause, an affected domestic industry could bring its case before the Tariff Commission and, upon a finding of injury by the Commission, the President was authorized to grant relief in the form of quotas and/or specified tariff adjustments. Hence, § 1862(b) was introduced in conjunction with a contrasting amendment which granted in express terms a tariff adjustment power to the President. In the Congressional debate over H.R. 1, these two amendments were frequently discussed together. This is not surprising in view of the fact that the application of the two provisions to suffering domestic industries overlapped. However, as a result, Congressmen speaking of the aid which would be available under the proposed amendments frequently did not distinguish between the two provisions.

See Senate Report No. 232, 84th Cong., 1st Sess. (1955); introductory comments of Senator Byrd, 101 Cong. Rec. 5292 *et seq.*; explanatory comments of Rep. Cooper, Chairman of the House Ways and Means Committee, in presenting H.R. 1 with the Senate amendments in the House, 101 Cong. Rec. 8159 *et seq.*

The escape clause was first added to the Trade Agreements Act in 1951 (65 Stat. 73; 19 U.S.C. 1363-1364). It was amended in 1955, 69 Stat. 166; in 1958 by the addition of a power to impose new tariffs up to 50% *ad valorem*, 72 Stat. 676; in 1962 by incorporation in the new "adjustment assistance" program, P.L. 87-794, 76 Stat. 882, 899, replacing 19 U.S.C. 1363-1364 with 19 U.S.C. 1901-1902, 1981; and again in 1974, P.L. 93-618, Title II, § 201, 88 Stat. 2011-2018, 2072, replacing 19 U.S.C. 1901-1902, 1981 with 19 U.S.C. 2251-2253.

[64] Kellam, *Regulation of Oil Imports*, 1961 Duke L. Rev. 175, 187 (1961); *The Oil Import Question*, Cabinet Task Force on Oil Import Control (1970), p. 3.

[65] The Advisory Committee recommendation is set forth at S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955), and is referred to throughout the House and Senate proceedings.

dent's authority to enter into foreign trade agreements under the Trade Agreements Act of 1934. The major impetus for the new national security provision in 1955 was the concern in certain quarters over the growing percentage of domestic oil consumption supplied by foreign imports.[64]

In 1954, President Eisenhower established an Advisory Committee on Energy Supplies and Resources Policy. Shortly before the Senate Finance Committee began hearings on H.R. 1, the White House issued a report of the Advisory Committee calling for a voluntary program to reduce oil imports to maintain the 1954 ratio of oil imports to domestic production.[65]

The Senate Finance Committee Report

During the Senate Finance Committee hearings on H.R. 1 Senator Neely of West Virginia introduced an amendment which would have restricted oil imports to 10 per cent of the total domestic petroleum demand.[66] Other proposed amendments would have placed quotas on other specific commodities, such as fluorspar, lead and zinc.[67] The Senate Finance Committee Report explains that the Committee chose the broad language of § 1862(b) in order to avoid multiple amendments setting quantitative import levels for a variety of national defense industries.[68] The general amendment was adopted to provide for flexible and open-ended application of quotas to an undetermined number of products crucial to the national security.

[66] Hearings on Trade Agreements Extension Act before the Senate Committee on Finance, 84th Cong., 1st Sess. 1032-1033 (1955) (hereafter Senate Hearings). Petitioners quote a statement of Senator Martin of Pennsylvania made during these hearings to the effect that the Neely Amendment would authorize the President to increase duties, and suggest that "it is fair to infer that [§ 1862(b)] was also so intended" (Pet. Br. 34-36). However, Senator Martin's remarks were never expressed in the statutory language, in a committee report, or communicated to the other Senators in debate. Statements by other co-sponsors of the Neely Amendment indicate a contrary understanding of the proposal as strictly a quota provision. *See* 101 Cong. Rec. 5538, 5593 (comments of Senator Monroney); Senate Hearings, p. 1272 (comments of Senator Daniel).

[67] S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955). *See, e.g.*, 101 Cong. Rec. 5299 (comments of Senator Millikin); 101 Cong. Rec. 5298 (comments of Senator Barkley). Similar proposals were advanced in the House. *See* Hearings on Trade Agreements Extension Act before the House Committee on Ways and Means, 84th Cong., 1st Sess. (1955); "Minority Views," H.R. Rep. No. 50, 84th Cong., 1st Sess. (1955); 101 Cong. Rec. 1791-2 (remarks of Rep. Mills).

[68] "The committee had before it several proposals dealing with specific commodities, namely petroleum, fluorspar, lead and zinc. In lieu of specific action on each of these the committee adopted an amendment which specifies that the Director of the Office of Defense Mobilization shall report to the President when he has reason to believe that imports of a commodity are entering the United States in such quantities as to threaten to impair the national security . . . the President, if he finds a threat to the national security exists, shall take whatever action is necessary to adjust imports to a level that will not threaten to impair the national security." S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955).

The Finance Committee Report also indicated a strong preference for the method endorsed by the President's Advisory Committee, *i.e.*, informal presidential action aimed at securing voluntary import reduction, rather than mandatory controls.[69] Since a voluntary program must perforce be a quota program, the Report indicates a clear focus upon a quota, not a tariff, program. There is no indication in the Senate Report that the national security amendment was intended to enlarge the power of the President to adjust duties, nor any indication of an intention to provide a new power to levy massive fees.

The comments on the floor by Senator Carlson of Kansas, a member of the Finance Committee, reemphasized that the broad language of § 1862(b) was settled upon with this intention:

> During the executive sessions much consideration was given to the limitation of oil imports and the limitation of other imports on a percentage or quota basis. After literal-

[69] "[T]he committee concludes that in the interest of national defense imports should be kept [at 1954 proportions]. It is highly desirable that this be done by ***voluntary, individual action*** of those who are importing or those who become importers of crude or residual oil. The committee believes that every effort should be made and will be made to avoid the necessity of governmental intervention.

"The committee recommends, however, that if in the future the imports of crude oil and residual fuel oils exceed significantly the respective proportions that such imported oils bore to domestic products of crude oil in 1954, appropriate action should be taken." S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955) (emphasis added).

ly days of discussion and thought, the committee wrote in a general amendment dealing with these commodities. There can be no doubt in my mind as to the intent of the committee, nor, do I believe, as to the intent of the Senate in regard to limiting the oil imports to the average daily imports of the year 1954. . . .

[I]nsofar as the junior Senator from Kansas is concerned, this colloquy at least interprets the congressional intent, including the intent of the Finance Committee, as I interpret it, as a result of my attendance at the hearings — and I attended most of them. . . . [D]uring the hearings, when we had before us some of the presidents of and other witnesses representing the larger importing companies, I brought out the fact that I did not like to have imports limited by means of a rigid *percentage* basis, and that I hoped they would ***voluntarily make an effort to hold the imports within the limits*** set forth in the advisory committee's reports. 101 Cong. Rec. 5389, 5391 (emphasis added).

Senator Barkley of Kentucky, another member of the Senate Finance Committee, gives a similar account of the reasons for the general language of the national security provision:

> I may say that the [national security provision] . . . was adopted by the committee in lieu of a number of amendments dealing with special commodities which affect all the States — mine especially. . . . Instead of adopting an amendment dealing with the separate commodities, each being dealt with in a separate amendment, and instead of undertaking to *impose quotas* the whole

subject was left to the discretion of the President, based upon recommendations by the Director of Defense Mobilization as to whether any of the commodities were essential to the national defense. . . . If the President finds they are, he can *impose such quotas* or take such other steps as he may believe to be desirable in order to maintain the national security.[70] Many Senators felt impelled by local situations and their own obligations to support individual amendments calling for *reservations, exemptions or quotas* for particular products. However, the amendment approved by the committee was voted for by an overwhelming majority of the committee, in lieu of the other amendments. 101 Cong. Rec. 5298 (emphasis supplied).

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[70] Petitioners argue that the use of the disjunctive by Senator Barkley ("impose such quotas or take such other steps . . .") implies that the Senator envisioned the provision as including a tariff power (Pet. Br. 37-39). Petitioners ignore the logic of the grammar, as well as the related legal rule of construction of *ejusdem generis*:

> Where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. 2A Sutherland, *Statutory Construction* 103 (1973). *See also Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726, 734 (1973).

The context of Senator Barkley's remarks indicates that the "other steps" to which he referred were other quantitative restrictions similar to quotas, *e.g.*, the "reservations, exemptions or quotas" referred to in the sentence immediately following.

The Conference Committee Report

The Report of the Conference Committee, which agreed to the Senate amendment to the House bill, added a comment relating the provision to other laws, which is crucial to understanding the broad language of the provision:

> In connection with amendment No. 29 [the national security provision] it is the understanding of all the conferees, both House and Senate, that it is not intended to, and does not, diminish or impair any authority the President may have under other laws. For example, it was emphasized that if the President sees fit to stockpile critical materials under any other law, that action may be taken wholly aside from the authority contained in this amendment. Conf. Rep. No. 745, 84th Cong., 1st Sess. 6 (1955).

The comment supports the argument of the respondents that § 1862(b) authorizes only the presidential imposition of direct import restrictions or quotas and that any other presidential action to restrict indirectly such imports is authorized only pursuant to powers and limitations delegated under other laws.[71]

[71] Such indirect import-restricting powers would include the power to stockpile under 50 U.S.C. 98, as well as the presidential powers granted elsewhere in the Trade Agreements Acts, such as the power to make certain tariff adjustments (19 U.S.C. 1336, 1338, 1351), to enter into special trade agreements with foreign countries (19 U.S.C. 1351) and to take action under the escape clause (19 U.S.C. 1363-64). *See* discussion *supra* at n. 63. These are among the tools at the President's disposal when an investigation and report under § 1862(b) mandate action to restrict imports.

Although the natural tendency of governmental stockpiling *per se* is to increase demand for a product and thereby increase imports, Senator Bennett, in the context of remarks on the Senate floor, pointed out that stockpiling *in conjunction with* the new national security amendment can provide a tool for restricting imports. He suggested that, by limiting stockpile purchases to domestic production or threatening to do so, the President has a "potent weapon" to secure voluntary export restrictions from foreign countries. 101 Cong. Rec. 5587.

The petitioners' argument that § 1862(b) by itself authorizes any presidential action which indirectly adjusts imports threatening the national security clearly makes superfluous the Conference Committee's comments, for it leaves no presidential action outside the scope of § 1862(b) to be diminished or impaired thereby.[72]

The court of appeals observed that committee reports are generally accorded greater weight than individual statements by legislators (Pet. App. 18a). *See also*, *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969). Accordingly, petitioners' argument was rejected as inconsistent with the Conference Committee Report.

[72] Petitioners claim that this statement in the conference report "was intended only to emphasize that the President would retain his authority, even in the absence of a threat to the national security, 'to stockpile critical materials under any other law'" (Pet. Br. 41, n. 29). Petitioners' interpretation is plainly contradictory to the specific example given by the Conference Committee. The Strategic and Critical Material Stock Piling Act (50 U.S.C. 98 *et seq.*) is a national security program designed to anticipate and prevent shortages of "strategic and critical materials . . . to supply the industrial, military and naval needs of the country for common defense." 50 U.S.C. 98.

Representative Cooper, Chairman of the Committee on Ways and Means, introducing the Conference bill to the House, singled out the same passage of the Conference Report as an important clue to construction. 101 Cong. Rec. 8160. Representative Cooper paraphrased the Conference Report to say that the President, in responding to a national security threat posed by imports, might rely upon *alternative statutory authority* such as stockpiling.

These comments of Congressman Cooper plainly do not, as petitioners claim, represent a "similar explanation" to theirs that the President retains powers "in the absence of a threat to national security" (Pet. Br. 41, n. 29). A later statement of Representative Cooper quoted by petitioners, that "[t]he President will enjoy full and unimpaired power in the administration of the [the national security] amendment," 101 Cong. Rec. 8161, contains no implication as to the actions authorized.

The Floor Debate

To the degree that individual comments of congressmen are relevant elements of legislative history, a review of the debate over H.R. 1 confirms that the Congress considered § 1862(b) a quota provision. In the initial House debate upon H.R. 1,[73] there is common reference to proposed amendments to impose a *quota on the importation of oil.*[74] There is not a single mention of presidential power to impose new or increased tariffs or fees to reduce imports of oil. The only allusions to a presidential tariff adjustment or fee power were made in express reference to either § 22 of the Agricultural Adjustment Act[75] or the escape clause.[76] The following remarks of Representative Mills, in a statement closing the debate on behalf of the Committee, reflects the understanding of the House members:

> The committee heard about a dozen representatives of the domestic petroleum-producing industry. They opposed H.R. 1 and urged the committee to impose a *quota on crude-oil imports.* . . .
>
> Then we heard the coal people tell us, "If you will put a *quota on the importation of residual oil* and deprive

[73] 101 Cong. Rec. 1661-91, 1727-96. Although § 1862(b) originated as a Senate Committee amendment to H.R. 1, the earlier House debate gives the background against which the House construed the Senate amendment when presented by the Conference Committee for House approval.

[74] Rep. Flood of Pa., 101 Cong. Rec. 1668; Rep. Perkins of Ky., 101 Cong. Rec. 1671; Rep. Poff of Va., 101 Cong. Rec. 1675; Rep. McCormack of Mass., 101 Cong. Rec. 1676; Rep. Bailey of W. Va., 101 Cong. Rec. 1679; Rep. Van Zandt of Pa., 101 Cong. Rec. 1758; Rep. Boggs of La., 101 Cong. Rec. 1768; Rep. Simpson of Pa., 101 Cong. Rec. 1790; Rep. Mills of Ark., 101 Cong. Rec. 1792.

[75] 101 Cong. Rec. 1774.

[76] 101 Cong. Rec. 1668, 1774, 1775, 1777-8, 1794.

> the people on the Atlantic Coast of enough residual oil to permit us to produce 11 million more tons of coal, it will go a long way toward a solution of the problems which we have." . . .
>
> I have been told that the coal industry has not found a way to go to the Tariff Commission to make a case under the escape clause. I have been told that by people in the coal industry. The only thing you could put in this bill that would have done one scintilla of good, if even that, would have been an *import quota on residual oil*. . . . The Department of Defense has always said that the importation of crude oil is necessary in the national interest. 101 Cong. Rec. 1791-92 (emphasis added).

The following statements made on the floor of the Senate are typical of the continuous discussion of the national security provision in the Senate debate:

> SENATOR MALONE [a member of the Finance Committee]: Mr. President, an amendment to H.R. 1 was accepted, in the Senate Finance Committee, providing that if the Office of Defense Mobilization, which Mr. Flemming heads, reports to the President that imports are endangering the security of the Nation, the President may investigate, and if he finds as a fact that the security is endangered, then he may *arrange quotas or safeguards.* 101 Cong. Rec. 5311 (emphasis added).

> SENATOR MONRONEY: I am glad that the committee included in its amendments a provision giving the President the right, after investigation, *to use quotas* for such

importations when he finds that such imports threaten to impair the national security. 101 Cong. Rec. 5538 (emphasis added).

SENATOR HUMPHREY: It is not my purpose this afternoon to discuss all the committee amendments, but I wish to comment on the amendment that was reached as a compromise — the Byrd-Millikin compromise. This amendment *gives the President authority to place import quotas* on any articles that threaten to impair the national security. . . . The provision as it stands would place *a quota* on any import that threatens to impair national security. 101 Cong. Rec. 5572 (emphasis added.)

SENATOR DOUGLAS: I notice that there has been written into the bill an amendment which gives to the Office of Defense Mobilization and the President the *power to impose quotas*. If Senators are opposed to the delegation of authority to reduce tariffs, why are they in favor of giving to the President the power to impose quotas? I ask for consistency from my friends. . . .

The last paragraph gives the Office of Defense Mobilization the power to recommend to the President and *gives the President the power to put import quotas into effect*. I suspect that certain Members believe they have received assurances that if they will vote for this bill, *an import quota* will be imposed on oil or that, at the very least, the imports will be frozen at the existing percentage, if not reduced to 10 per cent as I understand the Senator from West Virginia desires. 101 Cong. Rec. 5582, 5584 (emphasis added).

SENATOR MONRONEY: In reaching for a solution, the committee — and I wish to compliment the committee on what it has done — has attempted to provide that our domestic industries should be allowed to ask for the *imposition of quotas when imports endanger our security*. Thus, under the committee amendment the President would have the *right to impose quotas* if he found that the imports were damaging the security of the Nation.

On the other hand, under the former law [the existing escape clause] he could not do that; he could only impose tariffs or raise tariffs to relieve hardships.

We do not want a tariff on oil; we simply wish to share the market. . . . [T]he committee proposal merely gives the right to the President to *apply quotas*. 101 Cong. Rec. 5593 (emphasis added).

H.R. 1 as amended by the Finance Committee was presented to the Senate by Senator Byrd, as Chairman of the Committee. After presentation, Senator Byrd engaged in a number of explanatory colloquies, including the following:

> MR. SALTONSTALL: This is the final question I should like to address to the Senator. The problem of oil imports is taken care of in the last section of the bill. This gives the opportunity to the President *to adjust imports, under restrictive conditions or quotas*, after a report by the Director of Defense Mobilization, and after a separate, independent investigation by the President, if he believes the national security is being affected.
>
> MR. BYRD: That is correct, except the amendment applies to all commodities; it applies not only to oil, but to all commodities.

MR. SALTONSTALL: It applies to all commodities does it?

MR. BYRD: Yes. In other words, it *puts other commodities on the same basis as agricultural commodities.* It simply leaves to the President the power, in his discretion, to decide whether *to impose a quota or to reduce the imports.* 101 Cong. Rec. 5297 (emphasis added).

The court of appeals cited the above colloquy as demonstrating that "the intended scope of the action was limited to direct controls" (Pet. App. 16a).[77]

Petitioners suggest that Senator Byrd's reference to "agricultural commodities" implies that § 1862(b) authorized the

[77] Petitioners dispute this finding, asserting that "[t]he use of the disjunction — 'to impose a quota *or* to reduce the imports' — 'suggests that [Senator Byrd] did not consider the quota power to be the only power that was being delegated'" (Pet. Br. 39). The plain implication of Senator Byrd's words is that the President is authorized to impose quotas or take other action of the same genus, *i.e.*, quantitative restrictions. This interpretation accords with common usage, the customary rule of legal construction, and the context. See note 70, *supra*. The Senate Report, adopting the suggestion of the President's Advisory Committee, recommended that the President in the first instance exert *informal pressures* to secure *voluntary restraints* upon the importation of oil. In a discussion immediately preceding the colloquy with Senator Saltonstall, Senator Byrd cited an analogous situation where the President had avoided imposing an agricultural quota under § 22 of the Agricultural Adjustment Act by securing voluntary export restrictions from Argentina and Paraguay. 101 Cong. Rec. 5296. In his colloquy with Senator Saltonstall, Senator Byrd was quite clearly referring to voluntary restraints in using the term "reduce the imports." Senator Saltonstall speaks in terms of "restrictive conditions or quotas," while Senator Byrd refers to the decision to "impose a quota or reduce the imports." The type of non-quota "restrictive condition" which might "reduce the imports" would be the imposition of criteria for imported articles, such as a requirement that imported oil be of low-sulfur content, or that imported tomatoes be of a certain minimum size.

President to impose fees such as those authorized by § 22 of the Agricultural Adjustment Act, 7 U.S.C. 624 (Pet. Br. 38-39).[78]

However, the context in which Senator Byrd refers to the provisions of the Agricultural Adjustment Act clearly indicates that he was referring to agricultural quotas rather than fees. In a colloquy immediately preceding that with Senator Saltonstall, Senator Byrd engaged with Senator Thye of Minnesota in a discussion of the import protection available to prevent injury to domestic agriculture. The following comments were made:

MR. BYRD: [T]he President, upon investigation, can impose *quotas on agricultural products* under section 22 of the Agricultural Adjustment Act.

MR. THYE: The President may do so. . . . Can the President impose *an embargo*, and then have an investigation made?

MR. BYRD: The President can impose *quotas as he deems wise.* I shall read to the Senator a list of articles on which *quotas* have been imposed by the Department of Agriculture. The existing law now provides that on

[78] The comparison between § 22 of the Agricultural Adjustment Act and the national security provision, however, supports the narrow construction of the latter. Section 22, like the escape clause, exemplifies the orthodox Congressional practice of delegating tariff adjustment power to the President only by express terms and within specified limitations. Under § 22, upon an investigation, finding and report by the Tariff Commission of imports of agricultural products in quantities threatening to undermine programs of domestic agricultural regulation, the President "shall by proclamation impose such fees *not in excess of 50 per centum ad valorem* or such quantitative limitations . . . as he finds . . . necessary" to prevent interference with said domestic programs. It is telling that petitioners, in citing § 22 of the Agricultural Adjustment Act, omit the limiting language emphasized above (Pet. Br. 39).

> agricultural products, the President has a right to impose *quotas* after an investigation has been made. He has taken such action in a number of cases. 101 Cong. Rec. 5296 (emphasis added).

There is no mention in the interchange with Senator Thye of the imposition of fees on agricultural imports. Hence, the context of Senator Byrd's comment to Senator Saltonstall makes clear that Senator Byrd was referring to agricultural *quotas* only.

Petitioners make much of isolated statements by Senators Millikin and Bennett in the 1955 debate. These statements, petitioners assert, speak of the President exercising indirect import restrictions as well as direct restrictions or quotas.[79] Both statements are ambiguous on the crucial interpretive issue of whether they are directed solely to the national security amendment or to both of the substantial Senate Committee amendments, the strengthened escape clause and the national security provision.

The statement of Senator Bennett clearly does not refer to § 1862(b) alone:

> As I understand *the bill*, the ODM [Office of Defense Mobilization] will have at their command the entire scope of tariffs, quotas, restrictions, stockpiling and any other variation of these programs in order to protect a particular industry and to meet its particular needs. 101 Cong. Rec. 5588 (emphasis added).

[79] The court of appeals expressed the customary rule in stating its "normal reluctance to attach overriding weight to statements of individual legislators during floor debates" (Pet. App. 18a).

As the court of appeals concluded, the statement "clearly was made in reference to the entire bill and other existing laws" (Pet. App. 17a). The authority to stockpile is in fact nowhere authorized within the Trade Agreements Extension Act.[80] Senator Bennett's statement is thus a repetition of the Conference Committee's observation that the President retains broad powers under other provisions of the trade acts and under other laws.

The statement of Senator Millikin, expressed in a colloquy with Senator Daniel of Texas, is to the same effect:

> It grants to the President authority to take whatever action he deems necessary to adjust imports if they should threaten to impair the national security. He may use tariffs, quotas, import taxes or other methods of import restriction. 101 Cong. Rec. 5299.

It is unclear whether, in the second sentence quoted above, the Senator is referring to powers under the national security provision alone or under the several "avenues" by which the President may take action to protect domestic industry.[81] The statement can be construed to say that, upon a finding of imports threatening to impair the national security, the President can impose a quota under the national security provision, and in addition can take such other action to resolve the problem as is authorized under other laws. In other words, in mandating action by the President "to adjust the imports" of products

[80] *See* 50 U.S.C. 98 *et seq.*

[81] In the same possession of the floor, Senator Millikin referred to the escape clause and the national security amendments as "two avenues," and stated that "neither is exclusive. All remedies available before these remedies were proposed will be available afterward, particularly those which focus on defense industries." 101 Cong. Rec. 5302.

threatening to impair the national security, Congress may assume that the President will also bring such other powers as he has to bear on the problem.

On the subsequent day of debate on the bill, Senator Douglas, the chief Congressional champion of free trade, engaged in an interchange with Senator Millikin. Senator Douglas explicitly directed his comments to the remarks of Senator Millikin upon which petitioners rely and nonetheless characterized the amendment as simply "giv[ing] the President the power to put import quotas into effect."[81] Senator Millikin did not challenge Senator Douglas' understanding of the scope of presidential authorization, although he did challenge other aspects of Douglas' understanding of his earlier remarks. 101 Cong. Rec. 5584. Senator Millikin's failure to contest Senator Douglas' characterization of the national security provision is inexplicable if, as petitioners suggest, his earlier remarks envisioned a sweeping grant of the tariff power.[83]

[81] SENATOR DOUGLAS: "The last paragraph gives the Office of Defense Mobilization the power to recommend to the President and *gives the President the power to put import quotas into effect*. I suspect that certain Members believe they have received assurances that if they will vote for this bill, an import quota will be imposed on oil or that, at the very least, the imports will be frozen at the existing percentage, if not reduced to 10 percent, as I understand the Senator from West Virginia desires.

"What has happened in the case of fluorspar, lead and zinc, I do not know. But *the Senator from Colorado* [Mr. Millikin], with his beaming benevolence which reassures all of us, *said on Monday* that he thought these industries would be adequately taken care of, and I think those who have looked into his benevolent face have concluded that oil, coal, fluorspar, zinc and lead *will have quotas imposed* upon them." 101 Cong. Rec. 5584 (emphasis added).

[83] There appears to be some question of the accuracy of the record of Senator Milliken's remarks. On the subsequent day of Senate debate, Senator Daniel asked Senator Millikin to repeat a portion of their colloquy immediately preceding the passage cited by petitioners, because Senator Daniel had found the printed record did not agree with his recollection:

The court of appeals found Senator Millikin's statement to be "a woefully slender reed" to support the petitioners' contention (Pet. App. 19a), in light of his "somewhat self-serving posture" as a representative of a state with considerable economic interest in the proposal.[84] The court also found Senator Millikin's statement to be contradicted by explicit statements of Senator Byrd, then Chairman of the Finance Committee (Pet. App. 19a), and by the Conference Committee Report, and to be "inconsistent with all the other legislative history recounted above" (Pet. App. 18a).

Representative Cooper, Chairman of the Committee on Ways and Means, reported the Conference bill to the House with strongly expressed reservations. 101 Cong. Rec. 8159 *et seq*. The comments of Representative Cooper focused upon the twin Senate amendments, the strengthened escape clause and the national security provision, and discussed the two

MR. DANIEL: "Mr. President, on Monday of this week, the distinguished senior Senator from Colorado [Mr. Millikin] was kind enough to answer several questions put to him by me. I appreciate his courtesy. However, I noticed that the Record, as printed, shows an answer to my last question which I did not understand to have been given, and which I do not believe the senior Senator from Colorado intended." 101 Cong. Rec. 5565.

[84] Pet. App. 17a-18a. *See also*, 101 Cong. Rec. 5922, as follows:

> SENATOR MILLIKIN: The amendment which the Senator from Texas and I have been discussing has been accepted by the administration. It has been approved by Senators from States where the protection of items essential to the national security is large and important.
>
> Colorado has coal and petroleum; it is a very important supplier of lead and zinc; and it is one of the few States producing fluorspar. Not many States have a greater interest in the effect of this amendment than the great State which it is my good fortune in part to represent.
>
> It is of considerable importance to me that this amendment provide an adequate vehicle for assistance to industries whenever imports threaten to impair their ability to supply the commodities needed for national defense or security.

together as interrelated, as was the pattern in Senate debate. It is illuminating that Mr. Cooper saw the strengthened escape clause as the more "damaging" measure:

> The two most ominous amendments adopted by the Senate are those relating to the escape clause and the peril point, and the so-called national security amendment. . . . Of these the most damaging in my opinion, was the amendment to the escape clause. 101 Cong. Rec. 8159.

Petitioners' construction of the national security provision would encompass the escape clause powers to impose quotas and to grant tariff relief without the limitation on tariff adjustments specified therein. Mr. Cooper's characterization of the escape clause as the more damaging of the two amendments clearly shows that he did not conceive the national security amendment to grant without limitation all the sweeping presidential powers claimed by the petitioners.[85]

[85] Petitioners claim that Rep. Cooper implies "an understanding that the President would not be limited to quantitative import restrictions" (Pet. Br. 40). The statement cited is ambiguous. It is concerned not with the reduction of imports under § 1862(b), but with a "a curtailment of *exports* by the United States." 101 Cong. Rec. 8161 (emphasis added). Cooper's own language does not suggest, contrary to petitioners' assertion, that he was thinking of possible consequences of § 1862(b) alone. In context, Rep. Cooper was reiterating the free trade argument that the national security is best served by increased international economic cooperation and that "any decision" of the President (under the escape clause, § 1862(b), or other protectionist provision) will threaten that objective and bring economic retaliation.

It is inconceivable that a measure giving the President the power to impose unlimited tariffs on any commodity, upon a finding of national security without a hearing, could sail through Senate and House approval without the most heated and extensive resistance imaginable. That not one Senator or Representative raised his voice to oppose such an extensive grant of power leads to the conclusion that such power was not granted at all. Thus, a study of the 1955 Congressional proceedings leads inescapably to the conclusion stated by Representative Mills that, in enacting the national security provision, Congress "never intended any such use of tariff duty adjustments." 116 Cong. Rec. 37848.

b. THE TRADE AGREEMENTS EXTENSION ACT OF 1958.

The Trade Agreements Extension Act of 1958 reenacted § 1862(b) with only minor changes and added § 1862(c). A substitute bill for the national security provision was proposed on the floor of the House in 1958 by Representative Simpson of Pennsylvania. The substitute bill largely tracked the language of the Committee's national security provision, but would have authorized the President either (a) to increase the existing duty on imports threatening to impair the national security by not less than 50 per cent above the rate of July 1, 1934, or (b) to set a quota limitation. 104 Cong. Rec. 10877. The substitute bill was rejected. In conjunction with the original Congressional discussion of § 1862(b) as a quota provision, and its implementation up to 1958 in voluntary oil import quotas, this rejection of the Simpson Amendment implied both that the House did not believe § 1862(b) previously conferred a tariff power and that the House did not intend it to do so. It should be noted, moreover, that when in this substitute bill it was specifically proposed to grant the President a tariff adjustment power in the national security provision, the proposal followed the orthodox Congressional method, delegating such power only within clearly specified Congressional limitations.

Under the authority of the 1958 Act the President on March 10, 1959, by Proclamation 3279, imposed the Mandatory Oil Import Program. It established the quota system restricting the importation of oil products which remained in effect until 1973. From the enactment of § 1862(b) in 1955 until 1973, no action was taken under this section to restrict imports except in the form of the imposition of quotas. Such long-standing contemporaneous construction is instructive in ascertaining legislative intent:

> If the meaning of the statutory words was doubtful . . . contemporaneous and long-continued practical construction of the act on the part of those charged with its administration . . . is accepted unless there are cogent and persuasive reasons for rejecting it. *United States* v. *Shreveport Grain & Elev. Co.*, 287 U.S. 77, 84 (1932).

c. THE TRADE EXPANSION ACT OF 1962.

The Trade Expansion Act of 1962 undertook the most extensive revision of the reciprocal trade agreements power of the President since 1934. As a result, the Congressional debate was exceptionally lengthy even for the Trade Agreements Acts. The national security provision, however, was reenacted unchanged except for altering the name of the investigatory agency.[86]

The feature of the 1962 Congressional debate which is virtually conclusive of legislative intent is an amendment proposed by the Senate Finance Committee which failed to secure Congressional approval. The Senate Finance Committee reported the bill (H.R. 11970) to the Senate with a proposed new § 353 which, if it had been enacted into law, would have specifically delegated to the President precisely the power claimed in Procs. 4210 and 4341. The abortive § 353 read as follows:

> Notwithstanding any other provision of law, the President may, when he finds it in the national interest, proclaim with respect to any article imported into the United States —
>
> (1) the increase of any existing duty on such article to such rate as he finds necessary,

[86] P.L. 87-794.

(2) the imposition of a duty on such article (if it is not otherwise subject to duty) at such rate as he finds necessary,
(3) the imposition of such other import restriction as he finds necessary. 108 Cong. Rec. 19875.

The conclusion is inescapable that Congress, in rejecting proposed § 353, was indeed rejecting an authorization to levy new duties to restrict imports which threaten to impair the national security.

The comments of Senator Holland of Florida clearly indicate that § 353 was perceived as an unprecedented delegation of the tariff power:

> [S]ection 353 . . . is a very great departure from anything that the Congress has ever done before by way of granting power to the Executive in the field of trade. . . .
>
> In other words, in instances in which Congress had not found it to be necessary heretofore, the provision would allow the President to create a tariff.
>
> Such a broad grant of authority would be, to the Senator from Florida, without understanding of its limitations, such an obstruction and such a hurdle that I could not cross it in voting for the bill. 108 Cong. Rec. 19875.

The court of appeals considered the rejection of § 353 as an important index of legislative intent:

> Quite simply, the proposal explicitly gave the President the same authority he claims derives implicitly from section 1862(b). . . .
>
> Two conclusions, equally devastating to the Government's position, can be drawn. The fact that the proposal was introduced at all yields the inference the Congress believed that no other provision of the Act conferred that authority. [Citations omitted.] We also must conclude that Congress' eventual rejection of the provision indicates that it did not desire to confer this authority and discretion upon the President. (Pet. App. 20a-21a.)

Petitioners claim that since the rejected § 353 would have authorized both tariffs and quotas, the court's analysis "does not lead to a distinction between tariffs and quotas as a means of reducing imports" (Pet. Br. 46). This argument is without merit. Section 1862(b) was conceived as a quota statute and throughout the 1955 debate referred to as a quota amendment. Voluntary, then mandatory quotas on oil imports had been in effect under its authority since 1955. Obviously, therefore, the novel authorization in 1962 would have been the authorization of duties. Tariffs, not quotas, were rejected in 1962.[87]

[87] Petitioners attempt to distinguish the rejected § 353 from § 1862(b), on the basis that the former involved the "national interest," and the latter the "national security" (Pet. Br. 46). The distinction between "national interest" and "national security" is captious when considered in light of the expansive definition of "national security" in § 1862(c), which defines that term to encompass considerations of the economic and social welfare of the nation. A law review note cited by petitioners concedes, after suggesting this distinction:

> To be sure, this may be more of a verbal than a practical distinction, since courts have construed "national security" very broadly in other contexts. If a similar broad construction were applied to section 232(b), then its scope would be largely indistinguishable from the rejected proposal and this would seem to be contrary to legislative intent. Note, 90 Harv. L. Rev. 432, 436 (1975).

Senator Byrd, Chairman of the sponsoring Finance Committee, explained the rejection of § 353 to the Senate as follows:

> Section 353 proposed to give the President unlimited and undefined power to impose tariffs and quotas in any situation where he thought the Nation's interest required. After an affirmative finding by the Tariff Commission, the President already has authority to impose quotas and tariffs, but other sections of this legislation spell out the limitations upon this authority. The other thing that section 353 appeared to do was to let the President decide what was in the national interest *without setting out any standards*. The whole concept of our trade program is that through an orderly procedure, facts are presented and judgments are made upon those facts. While the facts may show some measure of injury, the President is not bound by the recommendation made to him by the Tariff Commission nor is the Congress bound by the decision made by the President. Each may look at the facts and reach a conclusion, and this conclusion involved a consideration of the national interest. Section 353 was a sword which could cut two ways: First, one problem was that there was no procedure prescribed for ascertaining the facts and second, the other problem was that the Congress did not retain the same opportunity for re-

> viewing as the other[88] sections of the bill provide. 108 Cong. Rec. 22182.

The rejection of § 353 manifests again in unmistakable fashion the intention of Congress not to grant the presidential powers petitioners imply in § 1862(b).

d. THE TRADE ACT OF 1970.

The authority of the President to negotiate foreign trade agreements pursuant to the Trade Expansion Act of 1962 expired June 30, 1967. At the request of the President for renewal of this authority, the House Ways and Means Committee exerted a major effort to report the Trade Act of 1970, H.R. 18970. Hearings were conducted from May 11 until June 25, 1970, and the Committee met in executive sessions for over a month.[89]

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[88] Petitioners suggest that Senator Byrd was contrasting the absence of standards and safeguards in the rejected § 353 with § 1862(b) (Pet. Br. 45, 46). In point of fact, Senator Byrd contrasted the rejected § 353 not to § 1862(b), which contained no tariff power, but to the escape clause (§§ 1901, 1981) which did. Procedurally, a presidential tariff adjustment under the escape clause required a prior investigation and finding by a legislative agency, the Tariff Commission, § 1901(b). The escape clause set forth specific standards for relevant injuries (§ 1901(b)(1)), for what constituted a "serious injury" to domestic industry (§ 1901(b)(a) and (c) (1)), and even what legal standard of causation governed (§ 1901(b)(3)). Finally, the escape clause provided for Congressional review and override of the President's decision by concurrent resolution. One can properly infer from Senator Byrd's remarks on the rejection of § 353 that, since such specific procedures and standards are not present in § 1862(b), no tariff power is granted therein.

[89] H.R. Rep. No. 91-1435, 91st Cong., 2d Sess. 2 (1970); Tariff and Trade Proposals, Hearings before the Committee on Ways and Means of the House of Representatives, 91st Cong., 2d Sess. (1970).

There was extensive discussion of the problem of increasing oil imports and whether the quota system for regulating imports should be replaced with a system of protective tariffs.[90] In February, 1970, a majority of the members of the Cabinet Task Force on Oil Import Control had published a report recommending the replacement of the oil quota system with a system of oil tariffs.[91] The Task Force Report stated, somewhat tentatively, that it believed the President had the power to increase tariffs on oil imports under the national security provision.[92]

Petitioners seek to construe the almost immediate response of Congress in the abortive Trade Act of 1970 as an attempt to "rescind" an authority previously granted (Pet. Br. 47). In fact, a closer look at the language of the 91st Congress compels the opposite view. The Trade Act of 1970, as reported by the House Committee on Ways and Means, as passed by the House, and as reported by the Senate Finance Committee, attached the following proviso to amend § 1862(b):

> Provided, however, that any adjustment of imports shall not be accomplished by the imposition or increase of any

[90] H.R. Rep. No. 91-1435, pp. 23-24; House Hearing, *op. cit.*, especially pp. 2170 *et seq.*

[91] *The Oil Import Question* (1970). Two members and one observer on the Task Force, the Secretaries of Interior and Commerce and the Chairman of the Federal Power Commission, strongly opposed the Report's recommendations and wrote a Separate Report. *Id.*, App. 343 *et seq.* In addition, three of the majority of five members voting for the Report voiced Supplementary Views expressing certain reservations. *Id.*, 131-133.

[92] "Although it may be unusual for the President to increase tariffs, this power is conferred by the statute which authorizes him to take whatever action he deems necessary on national-security grounds to 'adjust imports'." *The Oil Import Question* 90.

The Task Force Report does not cite any authority for this construction of § 1862(b).

> duty, or of any fee or charge having the effect of a duty. In the case of any investigation under this subsection initiated by request or application, the Director shall make and announce the determination required by this subsection not later than 1 year after the date on which such request or application was made. H.R. Rep. 91-1435, 119.

Representative Mills, introducing the bill as Committee Chairman, responded to a question concerning the Cabinet Task Force Report's recommendation as follows:

> I had something to do with the drafting of the national security provision back in the 1950's. . . . What is here in law now we worked out in that conference. *We never intended any such use of tariff duty adjustments.* Whenever an industry essential to national defense was being impaired by imports *we intended that the injury be eliminated* immediately in the interest of national defense *through the use of a quota*, which would do it. 116 Cong. Rec. 37848 (emphasis supplied).

The explanation of the proposed amendment to § 1862(b) given in H.R. Rep. No. 91-1435 made explicit that the new language prohibiting any presidential fee or duty under § 1862(b) was seen to be declaratory of the previous law. The Committee stated that the new language was added on the basis of a review of the legislative history of the section. The Committee went on to emphasize that the new language in no way lessened the existing authorization of the President to adjust imports threatening to impair the national security:

The bill would amend section 232 of the Trade Expansion Act of 1962, the "national security provision", to provide that any adjustment of imports under that section shall not be accomplished by the imposition or increase of any duty, or of any fee or charge having the effect of a duty. The committee has reviewed the legislative history of section 232 of the Trade Expansion Act and its predecessor provisions in the trade agreements legislation, and concludes that the delegation of authority to the President to adjust imports should be limited to the use of quantitative limitations.[93]

> The amendment to section 232 is not intended in any way to foreclose the President from adjusting imports to such levels as he deems necessary to prevent impairment to the national security. Nor does it affect the flexibility of the President to modify import limitations already imposed under section 232 to meet increased demands for raw materials or other emergency requirements which may arise from time to time. H.R. Rep. No. 91-1435, 23-24.

In short, the Committee was saying that the new language would not change the law but would assure its proper construction in response to a novel construction suggested by the executive branch.

[93] Petitioners quote only the last half of the second sentence quoted above—*i.e.*, eliminating the statement that the amendment represented the Committee's reading of the legislative history — in order to suggest that "one might infer that Congress believed the President *did* have the authority under Section 232(b) to adjust imports by the use of monetary exactions . . ." (Pet. Br. 47).

The Senate Finance Committee reported the bill with the same proposed proviso attached to § 1862(b). The Report of the Committee, S. Rep. No. 91-1431, like the House Report, explained that the new language is declaratory of the Committee's review of the legislative history of the section. The Senate Report further explained that there were practical reasons why the tariff approach had never been contemplated as a tool to meet the national security problem.[94] These 1970 committee reports and the related legislative history further establish that § 1862(b) authorizes only direct import restrictions.[95]

[94] "The committee has reviewed the legislative history of section 232 of the Trade Expansion Act and its predecessor provisions in the trade agreements legislation, and concludes that the delegation of authority to the President to adjust imports should be limited to the use of quantitative limitations.

"The amendment to section 232 is not intended in any way to foreclose the President from adjusting imports to such levels as he deems necessary to prevent impairment to the national security. Nor does it affect the flexibility of the President to modify import limitations already imposed under section 232 to meet increased demands for raw materials or other emergency requirements which may arise from time to time. If, under particular circumstances, not foreseen by your committee, the President believed that duties or tariffs would be a more appropriate remedy in a case he would be free to request such authority from the Congress." S. Rep. No. 91-1431, 251. Comments regarding practical reasons for exclusion of a tariff power are quoted *supra* at note 34.

[95] Petitioners assert that in rejecting the 1970 amendment the Senate "determined not to rescind" a preexisting tariff power (Pet. Br. 47). In fact, the entire Trade Act of 1970 was attached in the Senate as a rider to the Social Security Amendments of 1970 (H.R. 17550) late in the session in a desperate attempt to secure passage of the trade bill. *See* introductory comments of Senator Long, 116 Cong. Rec. 41798 *et seq*. In order to allow passage of the Social Security bill, the Senate voted to strip the bill of "all of the nongermane amendments" and recommitted the trade bill to committee. 116 Cong. Rec. 43645, 43646. Hence, the entire trade act and not the specific amendment was rejected.

e. THE TRADE ACT OF 1974.

Section 1862(b) was reenacted in the Trade Act of 1974 with amendments requiring a new procedure for public hearings and naming the Secretary of the Treasury as the investigatory agency. P.L. 93-618. It was enacted in the midst of the gravest crisis in international trade since the 1930's. Dramatic changes in the international oil market represented a major part of the crisis. Between the reporting of the Trade Act (H.R. 10710) to the House on October 10, 1973, and the reporting of the bill to the Senate, on November 26, 1974, the price of foreign oil had escalated from $3.00 per barrel to $13.00 per barrel.[96]

A major stated purpose of the Trade Act of 1974 was the assertion by Congress of its own constitutional responsibility for the laying of duties and the regulation of foreign commerce. A principal theme of the Congressional debate was that, al-

In any case, Congressional concern over the aberrant construction of § 1862(b) was mooted when President Nixon determined not to adopt the Cabinent Task Force recommendation. *See* Hearings and Informal Proceedings before the Committee on Finance, United States Senate, 91st Cong., 2d Sess., Amendments to Incorporate the Text of the Trade Act of 1970, pp. 279-92. *See also*, 116 Cong. Rec. 41807 (comments of Senator Long).

[96] S. Rep. No. 93-1298, 93d Cong., 2d Sess. 13. As a result of this development, the oil import fee system imposed by President Nixon in Proc. 4210, April 18, 1973, designed to equalize the price of cheap foreign oil, was made obsolescent before it was to come into full effect.

though the President needed new authority to respond to the international trade crisis, any delegations of power to the President by the Congress should be specific, limited, and subject to Congressional oversight.[97] Clearly Congress did not at this point intend to grant the President, under § 1862(b), the power to impose duties unlimited in amount, on any article of foreign commerce, without Congressional oversight or review.

Petitioners suggest that "[i]n view of the unsuccessful 1970 amendment and the President's subsequent assertion of authority to impose license fees" in 1973, the reenactment of § 1862(b) in the Trade Act of 1974 "can only be viewed as an acquiescence in the President's interpretation" (Pet. Br. 48).

As this Court said in *Zuber* v. *Allen*, 396 U.S. 168, 185, n. 21 (1969):

> Legislative silence is a poor beacon to follow in discerning the proper statutory route. . . .
>
> This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional ina tion frequently betokens unawareness,

[97] *Id.*, at 3, 14, 25. The report also stated:

> Article I, Section 8 of the Constitution vests in the Congress plenary authority to 'lay and collect taxes, duties, imposts' and to 'regulate commerce with foreign nations'. Since 1934, Congress has periodically delegated to the President *specific and limited authority* to conduct negotiations with other countries for reciprocal tariff and trade concessions. . . . The Finance Committee's amendments seek to establish appropriate and constitutionally-sound guidelines and criteria to govern the exercise of the authority granted by the bill. *Id.*, at 14. (emphasis added). *See also*, remarks of Rep. Burke in the House debate (119 Cong. Rec. 40533) and Senator Ribicoff in the Senate debate (120 Cong. Rec. 21380).

> preoccupation, or paralysis. "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U.S. 61, 69. . . . Even less deference is due silence in the wake of *unsuccessful attempts to eliminate an offending interpretation by amendment*. (Emphasis supplied.)[88]

See also, *Helvering* v. *Hallock*, 309 U.S. 106, 119-121 (1940); *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 140-141, 143-144 (1941); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 560-561 (1944); *Cleveland* v. *United States*, 329 U.S. 14, 22 (1946); *New York* v. *Saper*, 336 U.S. 328, 334 (1949); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950).

Legislative acquiescence may have some validity where a long-standing administrative interpretation preceded Congressional reenactments. However, the first-tier fees were imposed by Proc. 4210 only five months prior to the reporting of the Trade Act of 1974 to the House. H.R. Rep. No. 93-571, 93d

[88] Since legislative silence in the face of contrary administrative *action* is an unreliable indicator of legislative intent, *a fortiori*, legislative silence in the face of equivocal *expressions* of administrative interpretation should be completely useless as an indicator of legislative intent. Yet petitioners cite an incidental opinion, recommending no action, hidden in a report in 1957 of the Office of Defense Mobilization to a subcommittee of the House Committee on Ways and Means, as probative of the intent of both Houses of Congress in 1958 (Pet. Br. 42, referring to Foreign Policy, Compendium of Papers on United States Foreign Policy, Collected by the Staff for the Subcommittee on Foreign Trade Policy of the Committee on Ways and Means, p. 643 (1958)).

Similarly, petitioners cite a statement in 1955 of Gerald D. Morgan, Special Counsel to the President, expressing an interpretation of the statutory language (Pet. Br. 40). Moreover, the statement of Morgan begs the petitioners' question, for "action [in] . . . any form appropriate to the situation" would include only actions within the statutory authorization, *viz.* "action . . . to adjust the imports." 101 Cong. Rec. 8162.

Cong., 1st Sess. (October 10, 1973). As this Court observed in *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726, 745 (1973):

> [Although the administrative] construction of the statute over an extended period should be given great weight . . . [t]his proposition . . . must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.

In *Saxbe* v. *Bustos*, 419 U.S. 65 (1974), relied upon by petitioners (Pet. Br. 48), five Justices of this Court upheld what they found to be a long-standing administrative construction from 1927 during which time Congress had reenacted legislation governing the subject matter a number of times. Four Justices in dissent found the relevant period of administrative practice to date only from 1952 and did not find clear evidence that Congress, in passing relevant legislation in 1965, addressed itself to the practice or intended approval. 419 U.S. at 86. Hence, one might infer from *Saxbe* v. *Bustos* that 47 years constitutes a long-standing administrative construction putting Congress on notice, but 22 years does not.[89]

In fact, Congress in passing the Trade Act of 1974 expressly indicated that it was postponing for separate legislation the complex national energy problem. In reporting the Trade Act in the House at the time of the oil embargo crisis of 1973, the House Committee on Ways and Means stated:

[89] *Compare Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 731 (1975), which noted a long-standing and consistent judicial construction of nearly 20 years.

> It is the intention of the committee to return to this important problem of establishing a rational and equitable allocation of import energy resources. H.R. Rep. 93-571, 93d Cong., 1st Sess. 36 (1973).[100]

The Committee reported in May, 1974, its promised bill to deal with imported energy resources. H.R. 14462. The bill would have amended § 1862(b) to provide for the imposition on oil and oil products of duties or fees within the specific limits and subject to legislative veto by majority vote of either House. H.R. Rep. No. 93-1028, Part 2, pp. 24-25. Once more it is clear that when Congress contemplated delegating a tariff-adjustment authority to the President, it did so only in explicit terms, with specific limitations, and with provision for Congressional review.[101]

[100] Rep. Vanik, a member of the Committee on Ways and Means, explained as follows:

> A most serious, glaring problem in the bill is its failure to deal in any way with the energy and raw materials crisis. In short, the bill has been overtaken and rendered almost obsolete by the oil embargo. As Robert Gardner, law professor at Columbia University and a Deputy Assistant Secretary of State during the Kennedy administration said in his recent speech to the National Foreign Trade Convention: The Trade Bill "has the appearance of a Rip Van Winkle who has returned to the international trade arena after a long sleep unaware that the most serious current threat to the economy of our country and that of our allies is the withholding of oil by the Arab countries." 119 Cong. Rec. 40575.

[101] Petitioners claim that the proposed amendment of § 1862(b) by H.R. 14462 "would have acknowledged the President's authority under the existing provision to adjust imports by use of quantitative limitations, duties, taxes, or fees" (Pet. Br. 48, n. 37).

No such acknowledgement is stated in the language of the proposed amendment, H.R. Rep. No. 93-1028, Part 2, pp. 24-25, nor in the explanatory text of the Report. To the contrary, the Report specifically attempted to lay the foundation for a retroactive legislative censure of the President's action by providing that "actions under section 232 [§ 1862(b)] in effect as of the date of enactment of the bill . . . shall be treated as having been documented and delivered to the Congress on the date of enactment." H.R. Rep. No. 93-1028, Part I, p. 65. Thereby the President's prior action would have been subjected to the bill's provision for legislative veto by majority vote of one House.

In the hearings conducted by the Ways and Means Committee preparatory to H.R. 14462, Secretary of the Treasury George P. Shultz testified. Representative Vanik questioned him concerning Proc. 4210. The Secretary conceded that the fees were not in fact reducing the importation of oil. Rep. Vanik indicated astonishment that the fees could amount to over $1 million on the oil cargo of a single tanker and commented, "[T]his tremendous license fee . . . is an intrusion into the rights of this Congress to tax." "Windfall" or Excess Profits Tax Hearings before the Committee on Ways and Means, 93d Cong., 2d Sess. 170-171 (February 4-7, 1974).

f. CONGRESSIONAL ACTION SINCE PROC. 4341.

President Ford issued Proc. 4341 imposing the second tier of license fees on January 23, 1975. On January 30, 1975, the Committee on Ways and Means reported H.R. 1767, a bill "to suspend for a 90-day period the authority of the President under section 232 of the Trade Expansion Act of 1962" to increase tariffs upon oil and to negate the fees imposed in Proc. 4341. H.R. Rep. No. 94-1, 94th Cong., 1st Sess. 1. H.R. 1767 was passed by both houses of Congress, but vetoed by the President on March 4, 1975.

The Report of the Committee on Ways and Means stated that the President had disregarded in practical effect the procedural requirements of § 1862(b). *Id.*, 4-5, 14. The Report also stated that "the degree of import restraint gained by the precipitous Executive action under the umbrella of national security is of minimal contribution to the overall goal of reduction of oil imports." *Id.*, 11. The Report expressed greater concern, however, that the presidential action represented an

intrusion into a sphere of Congressional responsibility for programs of taxation and regulation of commerce:

> What is of more basic concern is the effect the Proclamation has on the authority of the Congress. . . . There is no doubt that to allow the President's proclamation of January 23, 1975, to stand pre-empts the choices that are otherwise available to the Congress in developing its own approach to energy conservation through the tax system. . . .
>
> The existing license fee system and the import fee system proclaimed January 23 establishes a separate taxing mechanism, defining taxable units and categories of goods, determining equities among taxpayers based on assumed special circumstances, and assigning revenue collection responsibilities. The whole revenue and tariff system established by the President is outside the tariff and customs law and the Internal Revenue Code, and none of the criteria and guidelines for administering the system has been approved by the Congress. *Id.*, 12, 17.

The Committee Report also specified that the bill did not constitute ratification of the fees imposed by either President Nixon or President Ford:

> No Court has had an opportunity to consider the reach of the delegation contained in the Trade Expansion Act and this resolution does not purport to do so now.
>
> There is certainly grave doubt, at least, that a Court would uphold a claim that the Congress attempted to delegate virtually unlimited power to impose fees, no matter what euphemism is selected to denominate them, as a means of restricting imports. In any event, however, we understand the scope of that delegation will soon be determined in a Court action. . . .
>
> Nor does the Resolution ratify any previous actions by any President made in reliance on the National Security provisions of the Trade Expansion Act to impose dollar fees on imports, no matter whether this was done by Proclamation or in any other way. H.R. Rep. No. 94-1, 15. *See also*, S. Rep. No. 94-11, 7.

In the Energy Policy and Conservation Act of 1975, P.L. 94-163, Congress reasserted legislative control in the area of a national energy policy. The enumerated purposes of the Act are "to provide for . . . reducing the impact of severe energy supply interruptions; to increase the supply of fossil fuels in the United States . . .; [and] to conserve energy supplies." Section 2. The Act delegated to the President powers to develop strategic petroleum reserves (§§ 151 *et seq.*), to impose contingency conservation programs including rationing (§§ 201 *et seq.*), and to participate in international energy programs (§§ 251 *et seq.*), all subject to Congressional review (§§ 159, 201(b)-(e), 251(b), 551, 552). The Act requires the President to promulgate rollback ceiling prices on crude oil, resulting in a weighted average sales price for crude of $7.66 per barrel, subject to upward adjustments of not to exceed 10 per cent *per annum* (§ 401(a)).[102]

[102] Congress expressed its antipathy to use by the President of a taxing power in respect to petroleum in a number of ways. The Act provides that any energy conservation contingency plan prescribed by the President to reduce energy consumption may not "impose rationing or any tax, tariff, or user fee" (§ 202(a)(a)) and that "no rationing contingency plan . . . may impose any tax . . . or any user fee" (§ 203(e)). Congress did authorize the President to submit a report on possible incentives to domestic producers importing oil in order to reduce the price of imports (§ 13(e)), but any price-increasing tariff power was conspicuously absent.

The President removed the supplementary license fees as soon as this Act was passed. Proc. 4412. However, the President retained the first-tier license fees. Unlike the second-tier fees, which were designed for a reduction of imports by 8 per cent, the lower first-tier fees became obsolete when the price of foreign oil rose by 400 per cent (A. 283). Secretary of the Treasury, George P. Shultz, testifying before a committee of Congress in 1974, frankly conceded that the first-tier fees were not reducing the importation of oil into the country. Rather, he stated:

> [T]he system is designed for a long-run situation in which it may very well be that prices in the United States are above world market prices, or to put it another way, world market prices come down. "Windfall" or Excess Profits Tax Hearings before the Committee on Ways and Means, 93d Cong., 2d Sess. 170-171 (February 4-7, 1974).

The first-tier fees, thus, have no perceptible effect on oil imports and are still being exacted pending the time when they might become useful to that end. In the upshot, the oil import fee program as presently in effect represents a *reductio ad absurdum* of the petitioners' contention that the oil import fees are properly imposed under the authorization of § 1862(b) "to adjust the imports."

Conclusion

The judgments of the court of appeals should be affirmed.

Respectfully submitted on behalf of plaintiff states and their governors.

FRANCIS X. BELLOTTI
Attorney General of Massachusetts
S. STEPHEN ROSENFELD
THOMAS R. KILEY
Assistant Attorneys General of Massachusetts
JAMES S. HOSTETLER
Gadsby & Hannah

Respectfully submitted on behalf of plaintiff corporations and Congressman Drinan.

HAROLD B. DONDIS
WILLIAM F. GRIFFIN, JR.
JOE H. HICKS
Rich, May & Bilodeau
WILLIAM R. CONNOLE
Connole & O'Connell

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